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AMERICAN BAR ASSOCIATION
SEPTEMBER 1940 JOVRNAL VOL. XXVI NO. 9

Washington Letter

Havana Conference

THE recent centering of Washington's attention in another capital, that of the Republic of Cuba, has many interesting facets. An attempt to view those events in the perspective of the legal profession is interesting and desirable.

The specific provisions of the Convention, worked out among representatives of the twenty-one Western Hemisphere Republics, constitute the bare bones of the story. Focused at that week of conference were the past and the future. As for the past there was the four and one-half centuries of a new world's effort to develop international relations on a more livable basis than the old world had done in its many centuries; and, as to the future, there might be seen diverging all the prospects which one may care to visualize of nations (nations which were without a great deal of blood-written history among themselves) taking a new cooperative step in an effort to live by law rather than by brigandage.

In a world where individuals have so imperfectly learned to live by law, can we expect nations to do so with perfection? But, can we wait further to develop international law until we have perfect material to work with? When the business of living becomes necessarily hard for entire nations on this hemisphere, will there arise leaders, wholly predatory, who make a people act as though they were as much alike as cattle? If so, will other neighbor nations, with more potential abilities, sleep while these things are going on? Assuming that nations, as well as individuals, in the far ranges of history, are very much the same, is there anything other than good-neighborliness which may be injected into our western international relationships which will assure peace and justice? Is international justice based on exactly the same principles as justice between individuals? Specifically, as to national possessions, should property rights and territorial boundaries be based on the present *status quo?* If not, is there a better feasible basis? Is it practicable to attempt to make every nation self sufficient as to possession of raw materials? If so, is it possible to keep such a balance, equitably, throughout future developments of science and industry?

Or, if we assume that all idealism among nations is gone, and present force is the only thing which commands respect internationally what is the answer? Is the nation of good intent, but which believes in self preservation, any better than the worst? Dare it try to be any better?

The nub of this Conference of Nations and the resultant Act of Havana is that they have devised a system whereby the American Republics, by previous understanding, may try to be better than the worst; that is, they may act either together or separately to protect their interests, and the interests of their neighbors, from a foreign aggressor, without suspicion of each other and without themselves becoming predatory. There are two principal elements by which this is accomplished.

The first is the appointment of a temporary inter-American committee to assume administration of European possessions in this Hemisphere, which otherwise might be taken over by Hitler. This committee is to be appointed promptly and may act at once. It will have a member from each of the five nations principally interested in affairs in the Caribbean Sea, they being Cuba, Brazil, Colombia, Venezuela, and the United States. While this temporary committee is filling the emergency need, a convention, if ratified by two-thirds of the twenty-one republics, would create a permanent inter-American commission on territorial administration.

The second principal element is a recognition that, in case of necessity for the taking of immediate steps, any one of the American republics may act, either singly or cooperating with others, "in any manner required in its own defense or in the defense of the continent." In the taking of prompt action, either by one nation individually, or by the committee as mentioned above, it is understood that the United States would supply the necessary military force. If it were a committee action, the force would be under the general control of the delegates of the five republics mentioned. The other four members of the temporary inter-American committee might send token military units to show their purpose of cooperating.

Economic Factors for Defense

A start toward preventing subversive domination of South American trade by Hitler's Europe was made by the $500,000,000 assigned to the Export-Import Bank for buying surplus raw materials produced in the southern republics.

There was adopted a resolution that the several republics should "take the necessary measures to eradicate from the Americas the spread of doctrines that tend to place in jeopardy the common inter-American ideal."

The conference recommended that each government suppress all subversive activities and expel foreign diplomatic or consular agents violating rules against political activity.

It also was urged by resolution that the American nations each effectively prohibit "every political activity by foreign individuals, associations, groups or political parties, no matter what form they use to disguise or cloak such activity.

To Codify Nationality Laws

One very salutary bill which has good prospects of early enactment is that "To revise and codify the nationality laws of the United States into a comprehensive nationality code." This is H. R. 9980 and upon it there has been made Report No. 2396 by the Committee on Immigration and Naturalization of the House.

The measure is being urged strongly for passage at this time by the American Bar Association's Committee on Revision and Codification of United States Nationality and Immigration Laws, this being one of the Committees of the International and Comparative Law Section. The committee chairman, F. Regis Noel, of Washington, D. C., has pointed out that this codification of the 147 statutes on nationality can

be most valuable both to the Government and to the private practitioner in handling the many cases expected to result from aliens contesting deportation, following the registration of aliens beginning August 27, 1940.

Another situation in which the simplified code will be especially useful is in respect to the thousands of persons now in Europe who claim United States citizenship, having suddenly decided they would like to return here for permanent residence. Mr. Noel has indicated that the code would put teeth in our nationality statutes and would virtually stop the entry of aliens by illegal means. He stated that "a steady stream of undesirable aliens are continually entering illegally the ports along the Atlantic seaboard, particularly New York and as far south as Baltimore."

In reporting this bill, Representative Rees, of Kansas, referred to the committee's effort to conform to the requirement of the Constitution that rules of naturalization be uniform (Art. I, Sec. 8, cl. 4); and of the desire, by this Act, to "facilitate the naturalization of worthy candidates, and, at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset." There are a number of reforms which the immigration and naturalization laws need but which it has been decided to forego at this time in the interest of getting a simplified code more promptly. One of these which the Bar Association's committee is virtually agreed upon as desirable for some future time would establish a joint Justice-War-State departmental committee to act as an appellate tribunal on passport and visa decisions of the State Department.

Intervention by States, in Certain Cases

A new section may be added to the Judicial Code, to be known as No. 226a, which would permit intervention by States in certain pending cases. The proposed amendment provides that, whenever the exercise of a power by the United States, or the validity of such power is questioned in a federal court, and a determination of the question would involve a conflict with the exercise by a state of any governmental power asserted or used by the state, the Court would certify that fact to the Attorney General of the state. If the state chose to intervene, it would become a party to the suit with the right to present evidence, to make arguments, and to have all the rights and liabilities of a party. The bill to accomplish this, H. R. 7737, was introduced by Representative Satterfield, of Virginia. After passing both houses of Congress earlier in the year, it received the President's veto in June; but early in August the House passed it over the veto.

Registration of Aliens

The machinery set up at the post offices throughout the nation, for accomplishing the purposes of the Alien Registration Act of 1940, began functioning August 27 and will be operating until December 26; but it is hoped the bulk of the job may be accomplished before December 1, because of the busy holiday season in the latter part of December. The registration of any individual is a matter which likely cannot be rushed through in a few minutes, unless he has prepared the information in advance; hence, in order to avoid hardships, it is really necessary that each person concerned should attend to this duty at the earliest possible time.

Specimen forms, for the convenience of the alien in assembling the required information, are now available at the post offices. They are not the final registration forms, although the questions to be answered are identical. The official questionnaires will be supplemented by fingerprints and personal descriptions. The work of overseeing the registration will be done at about 7,500 local post offices. This includes all first and second class offices and any other post offices situated in county seats even though they do not have such classification.

The term "alien," for registration purposes, includes, generally, every foreign-born man, woman, and child in the United States and its possessions who has not been naturalized. Persons with first citizenship papers must register. There is no fee whatever attached to the registration; it is absolutely free. Posters on display throughout the country explain the registration in Italian, Spanish, French, German, Norwegian, Swedish, Russian, Yiddish, Slovak, Czech, Polish and Hungarian.

Commissioner of the Work Projects Administration, Col. F. C. Harrington, has announced that the teachers of W. P. A. adult educational classes will assist aliens in filling out the forms. He added that, while "there are, of course, no aliens on W. P. A. rolls, the nature of certain of our community service projects is such that we reach a great many non-citizens."

An estimate based on the 1930 census is that there are in the United States approximately 3,500,000 aliens. Special provision will be made for aliens confined to their homes or hospitals and other institutions because of sickness or infirmity. Registration workers will call on these people where notice is given that this is necessary.

Wire Tapping May Come Back

As this is written, the House has passed and there has been referred to the Senate Committee on Interstate Commerce the bill, H. J. Res. 571, "to authorize the Federal Bureau of Investigation of the Department of Justice to conduct investigations in the interests of national defense, and for that purpose to permit wire tapping in certain cases." Such investigations would be subject to the direction of the Attorney General and would be to ascertain the facts, to prevent and frustrate interference with national defense by means of sabotage, treason, seditious conspiracy, espionage, and so forth.

It is provided that section 605 of the Communications Act of 1934, which has been construed as barring evidence obtained by wire tapping, would not apply to investigations authorized under this bill. This provision could be used, however, only in cases where the Attorney General finds probable cause to believe that any of the above offenses have been or are about to be committed, and then only with certain limitations.

Errata

In the review of the Minersville School District case (July number, p. 578) the following excerpt from Mr. JUSTICE FRANKFURTER'S opinion was through some inexplicable error, shifted to the review of the dissenting opinion and thus attributed to Mr. JUSTICE STONE:

> "That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.
>
> "The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties."

THE SIGNIFICANCE OF THE HAVANA MEETING FOR THE AMERICAN REPUBLICS

By Dr. L. S. Rowe
Director General, Pan American Union

Dr. Rowe has been Director of the Pan American Union since 1920. He was Assistant Secretary of the Treasury during the Great War. From 1904 to 1917 he was head of the Department of Political Science of the University of Pennsylvania. Dr. Rowe has long been a prominent member of the American Bar Association. The following article was written by him especially for the Journal.

THE meeting of the Ministers of Foreign Affairs of the American Republics which assembled at Havana on July 21st of this year marks an important step forward in the development of unity of policy and unity of action of the republics of the Western Hemisphere. These "consultations" had their origin in a "Convention for the Maintenance of Peace" signed at the Buenos Aires Conference of 1936. The intention was to provide the machinery for immediate consultation of the directing heads of the foreign policy of the American Republics when any emergency situation arose affecting the peace and security of the American Continent.

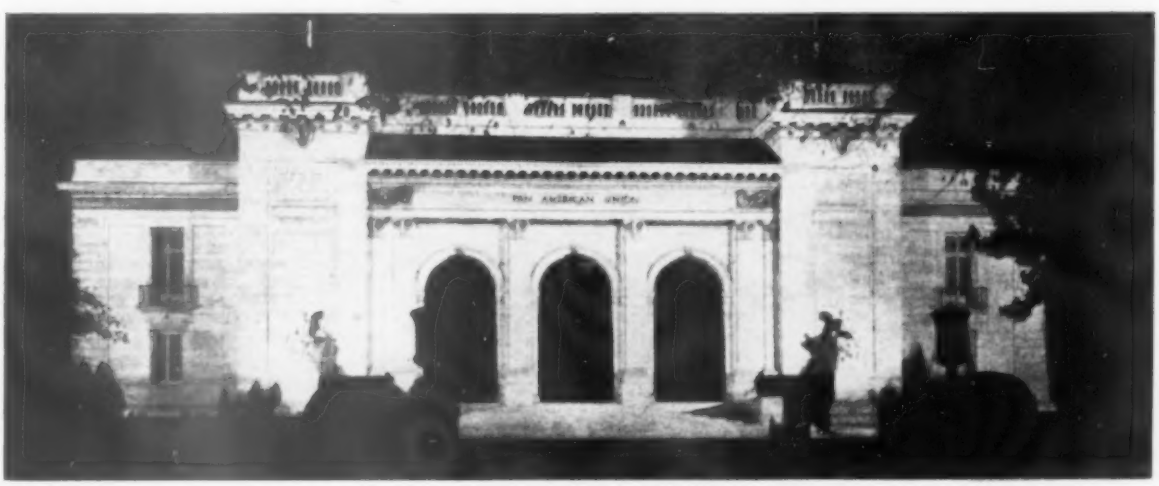
The outbreak of the European War gave rise to the first meeting of the Ministers of Foreign Affairs held at Panama City in September 1939. At this meeting important conclusions were reached especially in relation to the maintenance of the neutral rights of the American Republics. A permanent committee of experts to deal with every phase of neutrality was established and has been in session at Rio de Janeiro, formulating recommendations for submission to the government members of the Pan American Union.

The developments of the last few months in Europe and the consequent dangers involved to the peace and security of the American Continent made it imperative to call the Second Meeting of the Ministers of Foreign Affairs, which meeting assembled at Havana on July 21st last.

The outstanding characteristic of both the Panama and Havana meetings has been the manifest determination on the part of all the governments of the American republics not only to promote the united effort of the American republics to repel any aggression from without, but an equally firm purpose to protect the social and political institutions of this Continent against any subversive influence that may be set in motion by the totalitarian states.

An examination of the resolutions adopted and the convention signed by the delegates at this Havana Meeting discloses that significant forward steps have been taken in each of the three important spheres of action to which the Conference addressed itself; the preservation of the neutral rights of the American republics, the furthering of economic cooperation amongst the nations of this Continent and, most important of all, the preservation of the peace and security of the Western Hemisphere. It is with reference to this matter of continental security that a decision of far-reaching importance was reached. Briefly stated, it is provided that whenever any American area at present held by non-American nations is in danger of becoming the subject of a change of sovereignty to other non-American powers, the administration of such area shall be placed under the general supervision of an Inter-American Territorial Administration composed of one member appointed by each of the twenty-one Republics, who are members of the Pan American Union. This Commission shall designate the American Republic or republics which shall be entrusted with the immediate administration of such area.

This resolution which is hereafter to be known as The Act of Havana and its accompanying convention implement the Monroe Doctrine, for the first time in our history. It is a significant fact that this important



PAN AMERICAN UNION BUILDING
One of the "must" objects to be visited on a sight-seeing trip to Washington

step has been taken by the combined and unanimous action of the twenty-one American republics.

The Convention establishes the Inter-American Commission on Territorial Administration, to be composed of a representative from each American state ratifying the Convention. This Commission is authorized to establish a provisional administration in the regions to which the Convention refers; determine the number of states by which such administration shall be exercised, and also exert a general supervision.

The conditions under which the administration shall be exercised are set forth in detail in the Convention. It is emphasized that such administration shall be carried on in the interests of the security of America and for the benefit of the region in question, until such time as the region is in a position to govern itself or is restored to its former status. The first period of administration shall be three years, and if necessary there may be successive periods not longer than ten years each. The Convention will enter into force when two-thirds of the American republics have deposited their respective instruments of ratification.

The Convention has a number of provisions envisaging the welfare of the natives of a region under administration. It is stipulated that they shall participate, as citizens, in public administration and in the courts of justice, without further qualification than their capacity so to do. Freedom of conscience and of worship are guaranteed. Other sections have to do with education, health, and the abolition of forced labor. Additional provision for a measure of self-government is made in Article XI, as follows: "The natives of a region under administration shall have their own Organic Act which the administration shall establish, consulting the people in whatever manner is possible."

The administration thus provided for differs basically in its "raison d'être" from the mandate system established in the Covenant of the League of Nations. The former will be undertaken, if circumstances require, to assure the security of the American republics and to uphold a principle—the non-recognition of territorial gains made by force. The League Covenant arranged for mandates for backward peoples—for "those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the world," in the words of the Covenant.

Since some time must necessarily elapse between the signing of the Convention and its ratification by a sufficient number of states to make it operative, the Act of Havana was designed to cover this interim period. Like the Convention, the Act recognizes the danger to the peace and security of the American republics of any transfer of possessions from one non-American country to another, and creates a committee, composed of one representative of each of the American republics, which, in case of emergency before the Convention goes into effect, shall apply the provisions of the Convention and assume the administration of the region in question. The Act further provides that should the emergency be so great that action by the committee cannot be awaited, any of the American republics, individually or jointly with others, shall have the right to act in the manner which its own defense or that of the Continent requires. Another section of the Act is to the effect that as soon as the reasons requiring the administration shall cease to exist, and if such action would not be prejudicial to the safety of the American republics, such territories shall in accordance with the principle reaffirmed by this instrument that peoples of this Continent have the right freely to determine their own destinies, be organized as autonomous states, provided it shall appear that they are able to constitute or maintain themselves in such condition, or be restored to their previous status.

Important conclusions were also reached for closer economic cooperation between the nations of this Continent with a view to disposing of such agricultural surpluses as may accumulate.

Viewed in its larger aspects, the Havana Meeting marks a distinct step forward in the development of a unified continental policy. The spirit of inter-American cooperation which has been developed through these meetings and through the International Conferences of American States means much to the security and prosperity of the Western Hemisphere.

Carson Collection of Blackstoniana, Etc.

During the September meeting in Philadelphia, there will be on display at the Free Library of Philadelphia, on the Parkway between the hours of 9 a.m. and 10 p.m., selections from the *CARSON COLLECTION OF THE SOURCES OF THE ENGLISH COMMON LAW*. This is one of the really great collections of Blackstoniana (and earlier English legal documents) to be found anywhere in the world. Some of our members will recall that at the Philadelphia meeting in 1924 this collection was on display at the Historical Society of Pennsylvania, and attracted much attention. Because of the convenient hours of the present display, and the easy accessibility of the Free Library, it is expected many of our visiting members will view it.

The Print Room on the second floor of the Library will contain about its walls, engraved portraits of Chancellors and Chief Justices of England, accompanied by letters and manuscripts signed by many of them. In the cases in the room will appear printed treatises and pamphlets on the law written by these men. The period covered is from the reign of Henry IV (c. 1399) to that of George III (c. 1740).

In the Lobby upon the ground floor will be shown manuscripts and books from the time of Magna Carta to the middle of the 18th Century.

This display as a unit will illustrate what a lawyer in the American Colonies of 1740 might have seen, read or heard of in his study and practice of the law under English forms. The date 1740 is selected because it is the year in which the present University of Pennsylvania was founded, and because the University, in consequence, is now celebrating its 200th anniversary.

As a special feature of interest to the Bar Association, there will be on display in the room that houses the Carson Collection on the second floor and across the corridor from the Print Room an exhibition of Blackstoniana. This will comprehend engraved portraits, letters, manuscript notes for the second book of the Commentaries, Blackstone's original Patent of Precedence, and his Commission to the King's Bench, the first English and succeeding editions of the Commentaries, together with other pertinent items.

LEGAL BASIS FOR CONSCRIPTION

By Claude B. Mickelwait
Major, U. S. Army, Office of the Judge Advocate General, Washington, D. C.

The Journal *is pleased to be able to publish the following timely article, which has been written at our special request as an authentic and non-controversial discussion of this important topic. It was planned in the office of Major General Allen W. Gullion, Judge Advocate General of the United States Army, in consultation between the General, the representative of the* Journal, *and Major Mickelwait. General Gullion is a prominent member of the American Bar Association. Major Mickelwait is an expert on legal matters in the office of the Judge Advocate General.*

THE story of the Selective Draft Act of 1917 as recorded by the decisions of the courts now draws to a close. (See *United States ex rel. Bergdoll v. Drum*, 107 F. (2d) 897, December, 1939). However, the interest of the public in the general subject of compulsory military service has been aroused by the recent introduction in Congress of the so-called Burke-Wadsworth bill for selective service. Although the political aspects of this subject are the principal items of current debate, nevertheless an examination of its legal aspects is regarded as timely. Whether we speak of conscription, draft, or selective service we have in mind, in this discussion, the compulsion of service in the land and naval forces, as contrasted with voluntary enlistment therein and it is in regard to the compulsory feature of past laws and of the current proposals that the debates, legal as well as political, are chiefly concerned. In like manner, this discussion of the legal basis for conscription will deal largely with the compulsory feature of that subject.

The conscription of man power for military service is not to be regarded as a modern invention of sovereigns, be they kings, dictators, or the rulers of democracies. Many examples of the antiquity of this device could be given but it is sufficient to note the following views of publicists as an indication of its past recognition in the field of customary and appropriate methods for raising military forces:

> "Every citizen is bound to serve and defend the State as far as he is able. Society can not be otherwise preserved; and this union for common defense is one of the first objects of all political association. Whoever is able to bear arms must take them up as soon as he is commanded to do so by the one who has the power to make war." (Vattel, Book 3, c. 2, sec. 8.)
>
> "Since every citizen or subject is obliged to serve the State, the sovereign has the right, when the necessity arises, to conscript whom he pleases." (Vattel, Book 3, c. 2, sec. 9.)
>
> "In a word, we must give him [the sovereign] the power of levying troops, enlisting soldiers, and obliging them to perform the most dangerous duties even at the peril of their lives." (Burlamaqui, The Principles of Politic Law, Ed. 1791, Part IV, c. 1, sec. XII.)

Considering briefly the history of compulsory military service in the United States it may be pointed out that, prior to the adoption of our Federal Constitution, the drafting of men for military service was sanctioned and practiced both in the colonies and, after the Declaration of Independence, in many of the states. The constitutions of nine states during the Revolutionary War period recognized the principle of universal military service.[1] An equal number of states enacted draft laws to recruit the Continental Army. However, it is well known that, under the Articles of Confederation, the National Government was limited to making requisitions upon the states for military personnel. These requisitions were fortified upon several occasions by resolutions recommending drafts by the states from the militia.[2] However, the impotence of the National Government in its dependence upon the whims of the states was recognized by the Commander in Chief and on August 20, 1780, in a letter to the President of Congress, General Washington stated that a peremptory draft was the only method of providing soldiers.[3] Hamilton also recommended that for common defense the nation should have power to raise armies without limitation since experience had shown that the Articles of Confederation were defective in this regard.[4] Proposals restricting the national power to require military service of citizens were offered by several states[5] in the Constitutional Convention, but were uniformly rejected. The rejection of these limitations indicates that the makers of the Constitution intended to include in that instrument the power to draft. It may, therefore, be concluded that the principle of compulsion was recognized in this country prior to the adoption of the Constitution and, further, that the lack of power in the National Government under the Articles of Confederation to raise armies and provide for defense was a defect intended to be remedied by the Constitution itself.

The legal questions involved in present-day conscription by the National Government arise, therefore, from a consideration of the constitutional powers of the Federal Government rather than from a general denial that the power of conscription for military service is inherent in the sovereign. Implicit in the question of the constitutionality of Federal statutes providing for conscription are those clauses of the Constitution which give Congress the power "To declare War," "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces."[6] And to this enumeration must be added the general authority of Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing

1. Pa. Const., (1776) art. 8; Thorpe, American Charters, Constitutions and Organic Laws, vol. 5, 3083; Vt. Const., (1777) c. 1, art. 9, 6 *id.* 3740, 3747; Vt. Const., (1786) c. 1, art. 10, 6 *id.* 3753; Mass. Bill of Rights, (1780) art. 10, 3 *id.* 1891; N. H. Bill of Rights (1784) art. 12, 4 *id.* 2455; N. H. Const., Bill of Rights, art. 12, 4 *id.* 2471, 2472; N. Y. Const. (1777) art. 40, 5 *id.* 2637; Const. of Del. (1776) art. 9, 1 *id.* 562, 564; Md. Const. (1776) art. 33, 3 *id.* 1686, 1696; Va. Const. (1776) Militia 37 *id.* 3817; Ga. Cost. (1777) art. 33, art. 35, 2 *id.* 777, 782.

2. Journals of Congress (Ford's Edition, Library of Congress) 262-263; 10 *id.*, 199, 200; 13 *id.*, 299.

3. Sparks, Writings of Washington, 7, 162, 441-444.

4. Federalist, Nos. 22, 23.

5. Virginia, 3 Elliott's Debates, 659; North Carolina, 4 Elliott's Debates, 242, 244, 251, 252; Rhode Island, 1 Elliott's Debates, 336.

6. Art. I, sec. 8.

Powers."[7] Furthermore, one of the stated purposes of the Constitution is to "provide for the common defence" (Preamble).

The first Federal statute involving the application of the principle of conscription was enacted during the Civil War.[8] It may be noted however that, during the War of 1812, Mr. Monroe, the Secretary of War, recommended to Congress the enactment of a law providing for compulsory military service under the Federal Government.[9] A bill was introduced for that purpose, but the advent of peace eliminated the apparent necessity for such a measure and it was never enacted.[10] Following the Civil War no statute involving Federal conscription is to be found until the enactment of the so-called Selective Draft Act of 1917.[11] This statute, with amendments, like the Civil War Draft Act, was a wartime act effective during the then existing emergency. Thus it appears that during two wars in which this country has been engaged Federal troops have been raised by conscription and, as may be expected, the constitutionality of these laws has been considered by the courts.

Concerning the constitutional validity of these wartime conscription laws it may be said at the outset that, so far as the writer is aware, no decision of a Federal or State court has held that such laws are beyond the power of the Congress. The specific clauses of the Constitution set forth above are generally regarded as basis for this power although the general obligation to serve expressed by writers and other authorities has supported the favorable construction of these clauses. For example, in the Selective Draft Law Cases, *supra*, the court said, at page 378:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

Similar views were expressed in *United States v. Schwimmer* (279 U. S. 644, 650).

Proceeding from this general duty of the citizen toward the sovereign the validity of conscription when authorized by the Congress as a necessary and proper measure in the exercise of its enumerated powers has been sustained in numerous cases. An early elucidation of this principle is to be found in *Kneedler v. Lane* (45 Pa. St. 238), where Justice Agnew expresses the court's views in the following passage at page 322:

> "The constitutional authority to use the national forces creates a corresponding duty to provide a number adequate to the necessity. The duty is vital and essential, falling back on the fundamental right of self-preservation, and the powers expressed to declare war, raise armies, maintain navies, and provide for the defense. Power and duty now go hand in hand with the extremity until every available man in the nation is called into service, if the emergency require it; and of this there can be no judge but Congress."

See also *McCall's Case* (Federal Cases No. 8669, p. 1225 (1863)) to the same effect.

In passing it may also be noted that the draft laws of the Confederate States, enrolling the citizens directly into the service of the National Government, were likewise held to be valid, the courts relying upon constitutional provisions similar to those of the Federal Constitution. The specific grant of power to the Congress of the Confederate States "to raise and support armies" authorized the conscription of national forces as distinguished from the militia of the several states, without limitation as to the mode or manner of exercising the power.[12]

In like manner the general validity of the Selective Draft Act of 1917 as a constitutional method of raising armies was upheld by the courts. Any doubts on this score were effectively dispelled by the Supreme Court in the Selective Draft Law Cases, *supra*, and later cases affirming the views expressed in that case.[13]. Later it was said in *United States v. Macintosh* (283 U. S. 605, 622-623), a naturalization case, that the power to raise armies "necessarily connotes the like power to say who shall serve in them and in what way," and that "whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides." We may, therefore, conclude that it is the settled law of this nation that compulsory military service is a constitutional method for raising armies in time of war.

Current consideration of a conscription law, involving, as it does, the question of enforcing military service in time of peace, suggests the question whether the powers of the Congress in this regard are lessened by the fact that the country is not at war. So far our national experience has brought forth two conscription laws, each enacted in time of war and each limited to the duration of the emergency. It does not seem open to serious doubt, however, that peacetime conscription is equally valid. The underlying necessity of national self-preservation exists in time of peace as well as after war has been declared. In fact, the current trend as evidenced by recent events in Europe and Asia indicates a tendency to engage in war without the customary notice of a declaration. In such a case we ought not to lose our ability for self-protection by any rigid or mathematical determination that conscription is based principally or solely upon the constitutional power of Congress to declare war. Certainly there are other enumerated powers, equally efficacious, even if we fail to perceive the necessary connection between preparation for war in time of peace and the power to declare war. In the course of his opinion in the case of the peacetime enlistment of a minor, Justice Field said:

> "Now, among the powers assigned to the National government, is the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or *forced draft*, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. (Italics supplied) (*Tarbles Case*, 13 Wall. 397, 408.)

Justice Harlan spoke in similar language in *Jacobsen v. Massachusetts* (197 U. S. 11, 29):

> ". . . and yet he [a person] may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political connections, to take his place

7. Art. I, sec. 8.
8. Act of March 3, 1863, 12 Stat. 731.
9. Niles' Weekly Register, vol. 7, p. 137, et seq.
10. Selective Draft Law Cases, 245 U. S. 366, 385.
11. Act of May 18, 1917, 40 Stat. 76.
12. *Ex parte* Coupland, 26 Tex. 387 (1862); Jeffers v. Fair, 33 Ga. 347 (1862); Burroughs v. Peyton, 16 Gratt. 470 (1864).
13. Goldman v. United States, 245 U. S. 474; Kramer v. United States, 245 U. S. 478; Ruthenberg v. United States 245 U. S. 480; McKinley v. United States, 249 U. S. 397; O'Connell v. United States, 253 U. S. 142.

in the ranks of the army of his country and risk the chance of being shot down in its defense."

Other cases of like tenor involving peacetime service may be mentioned:

In re Grimley Petitioner (137 U. S. 147, 153).

United States v. Williams (302 U. S. 46, 48).

In the last cited case the court said, at page 48, "In virtue of its power to raise and support armies, to provide and maintain a navy and to make rules for the government of the land and naval forces, the Congress may require military service of adults and minors alike."

The foregoing views, when considered in conjunction with the decided cases upholding the validity of the wartime conscription acts, justify, it is believed, the prediction that a law providing for peacetime compulsory military service will, if the occasion arises, be regarded by the courts as within the power of Congress.

Before leaving the general subject of constitutionality of Federal conscription laws, certain features of the principal argument against the validity of such laws are of interest. This argument proceeds from the militia provisions of the Federal Constitution which give the Congress power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and "To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[14] It was thought by some that the grants of power to the Congress in respect of declaring war, raising armies, etc., were modified by the foregoing provisions thus requiring the exercise of the war powers by way of calling forth the militia. Undoubtedly, this view grew out of the restrictions upon national power in this regard in the Articles of Confederation, and the subsequent laws of Congress providing for the training and organization of the militia, of which the act of May 9, 1794,[15] is an early example. That this question had not been settled when the Civil War Draft Act was passed is illustrated by the views of the various justices in *Kneedler v. Lane, supra,* which were largely directed toward resolving the troublesome question of whether the Federal Government was supreme in the field of providing Federal forces or must exercise this power through the States by a call for the militia. Likewise, in the draft cases arising in the Confederate States the principal argument against the national power was based upon the supposed limitation derived from similar constitutional provisions relating to the militia. However, the courts of both the Northern and Southern States were unanimous in refusing to recognize the militia clauses as a limitation upon the power of the nation to raise armies by conscription or draft. Finally, in the Selective Draft Law Cases, *supra,* the Supreme Court of the United States held that, despite the militia clauses of the Constitution, the Congress has complete and dominant power to raise armies, saying, *inter alia,* at page 381:

"When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the States for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article I, § 10."

Further consideration was given this question in *Cox v. Wood* (247 U. S. 3) where the contention was made by Cox, a soldier drafted during the first World War, that, in view of the restrictions upon the employment of the militia, i.e., "to execute the Laws of the Union, suppress Insurrections and repel Invasions," the petitioner was not liable to serve in a foreign country. Again the court said that the plenary power of Congress to declare war and to raise armies was not subject to the limitations of the militia clauses and "knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution." Thus did the highest court of our land settle, in no unmistakable terms, the time-honored argument concerning the supremacy of the independent and plenary federal power to raise armies and use them according to necessity.

In numerous cases suitors made specific constitutional objections to the Selective Draft Act of 1917 and the courts uniformly dismissed these contentions as untenable. For example, the act authorized the President to prescribe regulations which, from necessity, were numerous and detailed. Accordingly, the objection was made that the act was void for unwarranted delegation of legislative authority. This contention was rejected by the courts.[16] Similarly, it was held that the act did not deprive the conscript of his liberty without due process of law, there being no universal right to the judicial process,[17] nor of his property since a person has in a proper sense no property right in his office or employment.[18] Nor was the requirement of compulsory service in contributing to the defense of the nation regarded as the imposition of involuntary servitude.[19]

Any law affecting the lives and fortunes of large numbers of our residents is bound to raise interesting and vital questions concerning specific classes of persons. In our discussion thus far we have proceeded upon the assumption that the laws relating to conscription subject citizens to liability for military service. The essence of the obligation is undoubtedly the tie of allegiance binding the citizen to the sovereign.[20] Out of this allegiance arises the duty to his country when called.[21] If the duty is based upon allegiance, it ought to adhere to the citizen wherever he may be. Apparently the Congress in 1863 as well as in 1917 was of this view since the liability of citizens to serve was not specifically qualified by any reference to place of residence.[22] Although the writer is not aware of any decided case which may be regarded as a complete answer to this question, it is of interest to note the case of *United States ex rel. Feld v. Bullard* (1923) (290 F. 704, cert. den. 262 U. S. 760) wherein the petitioner, a citizen of the United States, after registration

14. Art. I, sec. 8.

15. 1 Stat. 367.

16. Selective Draft Law Cases, *supra;* Angelus v. Sullivan 246 F. 54; Franke v. Murray, 248 F. 865.

17. Angelus v. Sullivan *supra.*

18. United States v. Olson 253 F. 233.

19. Selective Draft Law Cases, *supra;* Angelus v. Sullivan *supra.*

20. *In re* SIEM, 284 F. 868.

21. Selective Draft Law Cases, *supra.* See also quotations from Vattel and Burlamaqui, *supra.*

22. Act of March 3, 1863, 12 Stat. 731; Act of May 18, 1917, 40 Stat. 76.

under the 1917 Act, sailed to Brazil in July of that year and remained there until July, 1919. During his absence he was drafted by virtue of a notice mailed to him at his address in this country, which he failed to answer although a partial reply to the questionnaire of the local board was submitted by his father. Upon his failure to report as required in the notice he was recorded as a deserter. After his return to the United States he was arraigned for trial by court-martial for desertion and his petition for release from the Army authorities was denied in the case just cited. Certainly the decision is authority for the view that the liability to serve of a citizen who has registered is not terminated by his absence from this country when called. In this connection the following quotation is of interest:

> "Every sovereign has a right to call home those of his subjects who are in an enemy's country, or in any other country, when he thinks their presence necesssary to the defense of the state." (Von Martens, Book VIII, c. II, sec. 6.)

Note also the strength of the tie of allegiance announced by our Supreme Court in *Cook v. Tait* (265 U. S. 47) (power to tax a citizen resident in a foreign country) and in *Blackmer v. U. S.* (284 U. S. 421), wherein it was said, at page 437:

> "Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal."

Consider also the case of an alien in respect of liability to serve. Reference is made to the pertinent provision in this regard contained in the Civil War Draft Act, "persons of foreign birth who shall have declared on oath their intention to become citizens" and the similar provision in the Selective Draft Act of 1917, "male persons residing in the United States, not alien enemies, who have declared their intention to become citizens." That a declaration of intention does not change the status of an alien to that of a citizen seems clear.[23] Nevertheless, an alien, whether or not he has declared his intention to become a citizen, may be subjected to compulsory military service by the country of his residence.[24] However, the force of municipal law, which is the basis of this power, is naturally confined to the jurisdiction of the enacting sovereign unless another tie than mere physical presence gives it strength.

What is the rule under international law as to subjecting aliens to military service? It is generally said that military service is a duty incumbent upon citizens alone[25] and that an alien may not be compelled to render military service without violation of international law.[26] This view was also expressed by Mr. Bayard, Secretary of State, on February 3, 1888, in a communication to Mr. Bell, Minister to the Netherlands, with the qualification that in times of social disturbance or of invasion the services of aliens in police or home guards may be exacted.[27] It should be noted, however, that certain writers in the field of international law have recently expressed doubt that the liability for military service is limited to citizens[28] upon the basis of certain obligations of resident aliens with particular reference to declarant aliens.[29] Be that as it may, the diplomatic correspondence of the United States reveals a general attitude of conceding a right of exemption to aliens, particularly upon appropriate representations by foreign countries or upon renunciation of declarations of intention.[30]

Despite the apparent recognition by our Government of the qualified right of aliens to exemption from military service the fact remains that aliens were drafted during the first World War and further, as noted above, that courts were disposed to uphold the legality of this compulsion. The basis for these decisions was that the Selective Draft Act of 1917 made persons of the prescribed ages subject to draft unless exempted or excused by the designated authority. Accordingly, it was necessary to claim and receive exemption from the local board and if a fair hearing had been granted by the board the decision of that body was regarded as final.[31] Although the statute limited the liability to serve to declarant aliens, nevertheless nondeclarant aliens were held to service.[32] In the case last cited it was said that limiting liability for military service to citizens and declarant aliens did not exclude from the draft any who were not so obligated but were, nevertheless, required to register.

At this point it is interesting to observe the attitude of the courts as to treaties exempting aliens from military service. For example in *Ex parte Larrucea* (249 F. 981) four citizens of Spain who had filed their declarations of intention to become citizens of the United States sought release from detention for evading the conscription act, claiming that the treaty between Spain and the United States proclaimed April 20, 1903,[33] exempted them from compulsory military service in the United States. Certainly the words of the treaty were apt to confer exemption. Nevertheless, the court held that these aliens were not entitled to release on the basis of nonliability and grounded this decision upon the recognized judicial rule that a treaty occupies no position of superiority over an act of Congress but is, under the Constitution, on a parity with other expressions of legislative will and in the event of inconsistency the latest in time will control.[34] Accordingly, the claimants were remitted to the political head of the Government for appropriate relief under the treaty. For similar conclusions under the Selective Draft Act of 1917, as to nondeclarant aliens, see *Summertime v. Local Board, Division No.* 10 (248 F. 832); *Ex parte Blazekovic* (248 F. 327).

In the administration of any law for compulsory military service perplexing problems are bound to arise. The Selective Service Regulations of 1917 provided for the mailing of a notice to the selected registrant requiring him to report to the local board or, in special cases, to report to the Adjutant General of the state. The notice specified the day and hour the registrant would be in the military service. Suppose the registrant failed to report as required. Actually he had never served in the military forces. However, the effect of law and regulations transformed the recalcitrant registrant into a deserter under military law. Section 2 of the Selective Draft Act of 1917 provided, in part:

23. Johnson v. Nickoloff et al (52 F. (2d) 1074); Petition of Sproule (19 F. Supp. 995).
24. Napore v. Rowe, 256 F. 832; United States ex rel Koopowitz v. Finley, 245 F. 871; cf. *In re* Siem, *supra*.
25. 4 DAVIS, ELEMENTS OF INTERNATIONAL LAW, 154.
26. *In re* Siem, *supra*.
27. 4 MOORE'S DIG., 62.
28. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 64; HYDE, INTERNATIONAL LAW, vol. II, 244, et seq.
29. HYDE, INTERNATIONAL LAW, vol. II, 247.
30. HYDE, INTERNATIONAL LAW, vol. II, 248, et seq.
31. Napore v. Rowe, *supra; Ex parte* Beales, 252 F. 177.
32. Napore v. Rowe, *supra; Ex parte* Lamachia, 250 F. 814.
33. Stat. 2108.
34. Citing Cherokee Tobacco Cases, 11 Wall. 616; Head Money Cases, 112 U. S. 580.

"All persons drafted into the service of the United States . . . shall, from the date of said draft or acceptance be subject to the laws and regulations governing the regular army."

Of course, the laws governing the Regular Army included the Articles of War which then provided in Article 2 thereof[35] that the following persons, among others, shall be subject to military law:

". . . all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service [military service of the United States], from the dates they are required by the terms of the call, draft or order to obey the same."

Hence, the registrant was subject to punishment as a deserter if he refused to obey the summons.[36] Furthermore, the use of the postal service in giving notice by mail was deemed sufficient in law, actual personal notice not being required.[37]

Finally, it is of interest to note that the latest case involving the validity of the Selective Draft Act of 1917 and the regulations issued pursuant thereto reaffirms the previous decisions of the courts that the act in question was a valid and constitutional method for filling the ranks of the military forces of the country.[38] With the denial of certiorari in this case by the United States Supreme Court on June 3, 1940 (No. 974), we see at once the conclusion of a case of long standing interest and an indication of the current views of the highest court of our land on the legal basis for conscription.

35. Act of Aug. 29, 1916, 39 Stat. 651.
36. Franke v. Murray, 248 F. 865; United States *ex rel.* Feld v. Bullard, 290 F. 704 (cert. den. 262 U. S. 760).
37. *Ex parte* Bergdoll, 274 F. 458.
38. United States *ex rel.* Bergdoll v. Drum, Lieutenant General, et al., 107 F. (2d) 897.

NEED FOR A CENTER OF LATIN-AMERICAN LEGAL STUDY

By JOHN THOMAS VANCE*
Law Librarian of Library of Congress

WHEN James Monroe enunciated the doctrine of America for the Americas he took the first step on a road along which we have since travelled a considerable distance. From that principle that the Americas offered no longer a possibility for the imperialistic ambitions of nations of the Old World, there has naturally developed the theory that a closer cooperation between the American nations is essential to prevent the Monroe doctrine from being disregarded at will by other nations. A further recent, but natural, corollary has been the principle of partnership and joint enforcement of the doctrine.

Cooperation Between Lawyers in the Americas

Cooperation and collaboration between the countries of the Americas, if it is to endure, has to rest upon those political and economic principles in which these countries believe and practice. They may be subject to change, but only with the proviso that there shall be no restriction of those ideas of liberty and equality which are to the New World the very essence of life itself. A collaboration on the basis of these principles demands free economic and legal cooperation which, of course, would be diametrically opposed by totalitarian philosophies. Although dictatorships are not unknown in the Western Hemisphere, they have always been resorted to as temporary expedients and have not been of long duration; nor have they been asserted as principles of national policy, but rather sought to be excused as necessary for public order.

Unfortunately, nature has erected certain barriers preventing the complete cooperation, between these nations, that our imagination might envision. All forms of cooperation ultimately have to rest upon an economic basis to prevent them from becoming mere phantasmagoria. Economic collaboration has to consider the many differences in resources, climate, population, standard of living, and technical development. These and other factors offer frequently as many tendencies for a close cooperation as they may ultimately prove to be its cause.

As the races of mankind have progressed we have observed the growth of a highly integrated system of law among nations to take the place of primitive force in organizing the increasing and multitudinous economic activities on a basis of fairness and justice. Unfortunately, this international system of law and economics is now being severely put to the test, and the question is whether the *lex talionis* may become the law of this hemisphere, as the dictators have established it on the continent of Europe.

An important principle of the totalitarian philosophy is to develop large regional economic units with outlying possessions. These units are, according to the new philosophies, divided into primary and secondary regional economic units, which will not expect to trade upon a basis of equality, either with each other or with other parts of the world.

To prevent the Americas from being relegated to the rank of regions of economic dependence from these powers is one of the most essential problems of our day. This problem, although fundamentally economic, is nevertheless legal. The traditional democratic system lacks sufficient defense against totalitarian economic and cultural penetration, if left merely to economic factors alone.

To a very high degree, it will be the task of the statesman and the lawyer to work out a system of national and economic collaboration between the Americas that will be beneficial to all countries and at the same time proof against the foreign penetration which menaces them.

To weld this hemisphere into a cultural and economic unit in which every country will do its share and where the south will profit from the north, as much as the north from the south, is a task which demands the best of all of us. Much has already been

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done in the field of international cooperation, but the situation demands an increase in intensity and continuity of effort. Therefore, knowledge of the legal institutions of the Latin-American Republics, varied and different among themselves, has become of increasing importance to the government official in the United States, as well as to the individual lawyer or business man.

Hitherto, the North American lawyers interested in Pan-American law and Spanish law, have been restricted to those members of the profession who have been appointed to posts in the Philippines, the Canal Zone, or Puerto Rico, or who have represented firms having business in those regions, or in Latin-American countries. As a rule, the North American lawyer has taken up the study of the civil law and the Spanish or Portuguese language after having begun practice at home, or as law clerks or junior members while serving their firms abroad.

A number of the law schools have given elective courses on Roman law, while but few courses have been offered in Latin-American law and legal bibliography. This seems, more and more, a shortsighted view, having in mind the fact that lawyers, judges, and public administrators, equipped to deal with Pan-American problems, have been needed in the past, and will be needed much more definitely in the future. An intellectual curiosity on the part of the law-teaching profession would demand an interest in the laws of our Latin neighbors, if it were not already indicated by our international and economic needs.


PHILIPPVS HISPANIA
RVM ET INDIARVM
REX.

¶ Prouisiões cedulas
Instruciones de su Magestad: ordenãças ỏ diſtros y audiẽcia, pa la buena expedicio delos negocios, y administracio ỏ justicia: y gouernacio ỏsta nueua España: y pa el buẽ tratamiẽto y ꝓseruacio ỏlos yndios, dende el año 1525. hasta este ꝓsente de. 63.

EN MEXICO EN CASA
De Pedro Ocharte, M.D.LXIII.

Facsimile title-page of a copy of the first American lawbook. A compilation of *cédulas*, or orders emanating from superior tribunals in the name of and by authority of the King. Compiled by Vasco de Puga, a judge of the *Audiencia* of New Spain, and printed in Mexico in 1563. Taken from the Mexican collection of the Law Library of Congress.

Mutual Interests of the Lawyers

It may be argued on behalf of the North American lawyers that an interest in the Spanish and Portuguese languages, and the legal systems of the Latin-American countries would be of no practical benefit; since no "Yanqui" lawyers, save those practising in the large cities of this country, or along the Mexican border are likely to have any cases involving Latin-American law. This may be true; but our ancient and honorable profession has degenerated into a mere business, indeed, if it be limited, in its interests, to a knowledge of merely its own system. Would it not be better to eliminate some of the intensification of emphasis on "cases" in our system of legal education, and give more time to cultural study of a practical nature? Could we not, with profit, read something of the Spanish background of our own states and of the systems of our neighbors to the south of us?

Aside from the cultural value of the study of comparative Latin-American law and the various civil law systems from which it has sprung, the North American lawyer will find his Latin-American colleague far more interested in the social and economic problems of the day than his own brethren. Considerable experimentation is taking place in these fields in Latin America that is worthy of our study. For example, the new Cuban Code of Social Defense is a very advanced work on penal legislation which subject has received serious consideration also in Mexico, Colombia, and Ecuador. In the field of administrative law, of which the North American lawyer has only recently become aware, he

will find well established systems and voluminous literature. The Mexican writ of *"amparo,"* which combines the virtues of the *habeas corpus* and the injunction, is worthy of study, if not adoption.

Important Place of American Bar Association

Twenty years ago a column or so of the AMERICAN BAR ASSOCIATION JOURNAL was assigned to the Comparative Law Bureau for the review of foreign legislation, jurisprudence, and noteworthy legal literature; and the members of the Association were enabled to keep somewhat informed of the law of the more important countries of Europe and Latin America. Now is the time to revive and intensify this stimulating custom!

The American Bar Association is in a position to assume the leadership in this work of cooperation between the lawyers in this hemisphere, representing as it does ninety per cent or more of the organized bar of the United States. It is fortunate that the Association is already equipped for effective and intensive work of intellectual cooperation in the field of the law with the other American republics. The Section of International and Comparative Law, the successor of the Bureau of Comparative Law and the International Law Committee, which were consolidated in 1933, has already done notable work in reporting the status of Latin-American law in certain fields of commercial law and in honoring visiting Latin-American lawyers and judges at the meetings of the section.

Inter-American Bar Association

A noteworthy achievement in the field of cooperation between lawyers of the Americas has recently been made. We refer to the Inter-American Bar Association, which was organized during the May, 1940, meetings of the American Law Institute and the Eighth American Scientific Congress. Certain incidental features of the Constitution of the Inter-American Bar Association have been criticized and may well be changed, especially the failure to permit individual members in the Americas to join. There are many lawyers and law professors in both hemispheres who would delight in cooperating in this work, and who would render effective collaboration, but who are deprived of membership through not being representatives of the various organized bars. The new association will no doubt contribute materially to a rapprochement between the North, Middle and South American bars and inter-American understanding.

American Institute of International Law

At present the inter-American organization which deals with legal matters between the two Americas, namely, the American Institute of International Law, has its seat in Havana. It, too, has made important contributions to legal science. Since its field is limited, there is no reason that similar organizations should not be established in other parts of the Americas, and especially in the United States where our research facilities are extensive. There is no doubt that a center of Latin-American legal studies in Washington would answer an important need under the present conditions.

Law Library of Congress

Such a center could be easily established in connection with the Law Library of Congress. The Law Library has specialized for twenty-five years in Latin American law. Particularly during the last decade and a half intensive efforts have been made to gather as complete collections as possible of the legislation and jurisprudence of the twenty Latin-American republics and the mother countries of Spain and Portugal. Representatives have been sent to these countries, and contacts have been made with government officials, book dealers and publishers in order to obtain a constant flow to Washington of the official and private legal publications. The Library of Congress possesses a distinct advantage in being able to offer the official publications of the U. S. Government in exchange for those of the foreign governments, which reciprocal privilege is enjoyed by all of the Latin-American countries. Diplomatic and consular representatives are also helpful in calling attention to out of print material, or whole collections, and frequently a North American lawyer residing or travelling in Latin America renders valuable service in scouting for *desiderata*.

A series of legal guides and bibliographies was inaugurated under the direction of the Law Library of Congress in 1915. A guide to the law of Spain has been prepared by a specialist on Latin-American Law, Thomas W. Palmer. Dr. Edwin Borchard's well-known guide to the law of Argentina, Brazil and Chile appeared in 1917. A guide to the law of Mexico has been in preparation for some time.

Fortunately, the present Congress has seen the need for intellectual cooperation among the American republics, and has provided a moderate appropriation for the continuation of the work of interpreting the laws of our southern neighbors to our own bar and students of the political and social sciences. Thus, it may be possible to inaugurate the nucleus of a center of Latin-American legal research, ample funds for which it is hoped will be soon provided for either by the Congress or by private endowment.

Proposed Center for Legal Studies

It is proposed that the work of the center should be devoted primarily to making available every substantial publication relating to the law of Latin America and the mother countries. This would include the cataloguing of periodical literature, monographs and fugitive pamphlets which throw light on the law and its history. Such material would be available not only to the United States Government in all its branches, but also by inter-library loan or by microfilm to the North American lawyers no matter how far they be situated from Washington. As a gesture of cooperation, it is expected to extend this service to the Latin-American lawyers and students. The program of the center also would provide for original research, both legal and bibliographical, and the publication of guides, lists and monographs on subjects of current interest to the United States Government and to North American legal scholarship. Specialists on Latin-American law on the staff of the Law Library could be of great service in the preparation of special studies and in collaborating with the Hispanic Foundation of the Library of Congress, the American Institute of International Law, the Pan American Union, the Division of Cultural Relations of the State Department, the various government agencies, universities and colleges in the United States as well as in Latin America, bar associations, etc.

It is primarily the task of the various governmental agencies to develop Latin-American relations accord-

ing to the policy and program of the government, but in addition to the studies as an immediate goal, there is undoubtedly a need for long term legal studies on a broader foundation in connection with the possibility of a closer economic cooperation.

The problem of inter-American codification is another question which deserves continuing attention, although the Commission of Jurists at Rio de Janeiro of 1925 and 1927, and the Pan American Congresses have done important work in this field. Particularly in commercial law and procedure, in copyright and trademark law, and in social legislation there are still many problems that await solution. Continuation of the efforts for unification of law in the United States would undoubtedly accelerate this trend which is already stimulated by the constantly expanding realm of activity of the federal government.

Social and Economic Studies Needed

Another field, and perhaps the most important one, where a rapprochement between the American republics would be a promising subject of study is the legal philosophy of the various countries. The general outlook on life,—the social and economic thought—is the source where the actual laws, statutes and decisions find their origin, and where a mutual understanding should start. As Justice Holmes has said: "Law is a plant that lives long before it throws out its bulbs."

The common law system of the United States and the civil law systems of the Latin-American republics might find it easier to arrive at an understanding under the present conditions than hitherto. That the differences between the two legal systems are considerable is not gainsaid, but in view of the fact that both systems have profited from each other,—and peoples are able to live side by side as in Canada and the United States, under the two systems—it would seem that the task of reconciling the two would not be an impossible one, provided the parties desired it.

Also the economic and social background of the respective legal systems are subjects upon which capable minds may feel inclined to devote their attention. Law develops gradually and cannot be understood except on the basis of historical reality. Without a relation to this reality, law in itself forms neither a system, nor is it logical; it merely becomes a set of rules. The historical background of the Americas offers so much similarity and so much difference that it provides an excellent field for comparative studies.

We have attempted to indicate some of the problems of study which would come within the realm of a center of Latin-American legal studies, although obviously its first and most elementary task would remain that of providing the material without which no productive work could be accomplished. In normal times such a project might be attractive from a cultural point of view; under the present conditions it becomes far more important than that: it becomes a part of the urgent task to preserve those economic and political liberties which may be saved from destruction.

It is confidently expected that this small beginning by the United States Government may, therefore, stimulate compelling interest on the part of the bar and the law school in the legal systems and languages of our American neighbors. Their value would be both practical and cultural, even though there were no threat against the solidarity of the western countries, our republican institutions and our philosophies of life. Their study becomes imperative when we contemplate the impending danger to inter-American solidarity.

Institute on Judicial Research

THE JOURNAL has often stressed the great modern need for larger attention to Judicial Research. An interesting item on this subject has come to hand in the way of a leaflet prepared for the 1940 Annual Meeting of the Minnesota State Bar Association. In announcing a special survey of the work of the Supreme Court of that state, the leaflet says:

Institute on the Work of the Supreme Court

Professor Maynard E. Pirsig of the University of Minnesota Law School, the Secretary of the Judicial Council of Minnesota, will discuss a survey which he is making for the Judicial Council of the work of the Minnesota Supreme Court. The following statement by Professor Pirsig indicates the scope of the matters he will discuss. Members are particularly asked to note his request that if they have any suggestions as to what they would like to have considered they send those suggestions either to Professor Pirsig at the Law School or to the office of the state bar association at least seven days before the meeting.

The Judicial Council has been making a rather extensive study of the work of the Minnesota Supreme Court. Over 1,000 cases have been read and analyzed and the briefs and records have been examined in over 50 recent cases thus far. From this a considerable amount of material has resulted that should be of interest to lawyers engaged in appellate work, and I am very glad to accede to your association's request to present some of this material at the annual meeting of the association.

Among the items that I expect to cover are:

(1) A description of the manner in which the court proceeds in the decision of its cases, how it goes about its work both before and after oral argument. Many lawyers appear unfamiliar with what takes place in the Supreme Court after cases are submitted to it. A better understanding of it should aid in the preparation of records and briefs that are submitted to the Court. As far as the information is available, a comparison will be made with practices in other appellate courts.

(2) Defects and inadequacies disclosed in briefs that have been examined with suggestions for possible improvements.

(3) Defects and inadequacies disclosed in decisions of the Court from such aspects as length of opinions, failure to meet points raised by counsel, treatment of fact questions, etc. Criticisms within the bar of the work of the Supreme Court are not infrequent, and to the extent that I am aware of the points raised by them, I expect to deal with them as fully and as frankly as I can.

I hope you will make it clear to members of the bar that suggestions as to what they would like to have considered will be welcomed and may be sent, at least seven days before the meeting, either to the State Bar Association office, or to me at the University of Minnesota Law School. It is my understanding also, that full opportunity will be given for questions and discussion of the subject from the floor.

An article in our July, 1940, issue ("Volume of Judicial Decisons") commended and quoted from a study on "Judicial Business" which had been prepared in 1939 by the Judicial Council of Michigan. The article in this issue on the work of the "Administrative Office of the United States Courts," by Mr. Chandler, is of especial interest in connection with the subject of Judicial Research. The work being done by the Judicial Council of Minnesota is equally intriguing and challenging. Perhaps there are other states which are doing some similar work. Perhaps these ground-breaking examples may stimulate interest in the subject and lead other states to follow suit.

PEACEFUL PICKETING AND FREEDOM OF SPEECH

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FOR years labor organizations have been extending their sphere of influence and have been securing advantageous agreements through the coercion set up by picketing under increasingly attenuated circumstances. Attempts to curb this tendency by restrictive statutes were inevitable. But until the decisions[1] of the Supreme Court in April, 1940, it had probably never occurred to many people that peaceful picketing was henceforth beyond the reach of legislative regulation because it was constitutionally protected freedom of speech. This article contains a brief survey of modern developments in picketing, and it questions the attitude of the Supreme Court toward legislative restrictions of this coercive device.

I

Strikers have always tried by some form of picketing to prevent non-union workmen from taking their places. This device covers a wide range of activity—from mass picketing with physical violence and the notorious "sit down" to the more usual peaceful picketing of recent years. But violence, intimidation and interference were at one time such common manifestations of union picketing that most people still associate extreme unpleasantness with the term.

All American courts agree that violent and intimidating picket lines are unlawful, and they almost unanimously condemn the use of libelous and deceitful posters. But they do not generally recognize the legality of all peaceful picketing. In the first place this term is ambiguous. By hypothesis, it excludes violence, intimidation, interference and abusive language. By usage it has come to exclude defamatory and fraudulent posters. Practically, it signifies the mere giving of notice by one or two pickets at each door or gate of the premises in order to avoid any implied show of force by numbers alone. The term does, however, apply to *all* picketing, including stranger picketing, whatever the nature of the alleged labor dispute may be, from which the objectionable features just recounted are absent.

Like other self-help devices of organized labor, picketing is used because it compels. Employers and merchants condemn it as an invasion of their rights to do business, which necessarily include access to labor and to customers without interference. They regard picketing as an affirmative undertaking to deprive them of these beneficial relations unless they change their business methods to conform to the economic desires of the labor unions. And that, of course, is exactly what it is. Proponents of organized labor contend that picketing is merely an attempt to persuade others to accept the values of the union concerned and to cooperate with the union in promoting its economic program. If successful picketing compels because of the damage caused to the picketed enterprise, that is merely a consequence of the revised social opinions of those whom the picketers have convinced! But this is merely a polite way of saying that labor unionists claim the privilege to compel by cutting off the essentials to continued enterprise, as long as they do it peacefully and by persuasion and appeal.

This frank statement should not upset anyone. The privileged deliberate infliction of damage on another is a commonplace in our law. Most successful business competition proves ultimately harmful to someone. Trade associations blithely ruin all who refuse compliance with their standards; yet the courts remain complacent. The strike (or labor boycott in its simplest form) is used because it compels and is extremely damaging; yet we all recognize it as a legitimate counter in the eternal conflict of economic interests. Peaceful picketing, then, cannot be condemned merely because it causes harm.

But a practical distinction exists between picketing activities on the one hand and strikes or boycotts on the other. The former constitute active interference and the latter are purely passive refusals to deal. If men collectively refuse to furnish services or to spend their wages for certain goods, except upon terms they stipulate, it is almost impossible to condemn their position without recourse to some sort of conspiracy notion. But when a union coerces an employer or a merchant for hiring or selling as he pleases, by parading before his place of business and actively influencing others not to deal with him, a practical difference is obvious. The common law reveals an ancient judicial antipathy toward all active interference with the interests of others. Nor does the recitation of active and efficient competitive practices in business as privileged commission of harm greatly affect this argument, since they help to improve service and to lower prices for all, incidental benefits which hardly follow from increased labor organization. At any rate, those who sincerely believe labor unionism to be a menace to society and dangerous even to its constituents—the only possible beneficiaries—may pardonably take the position that government goes far enough in tolerating organized labor's refusals to deal and should not uphold its active disruption of the business of others.

But the permissibility of peaceful picketing cannot be passed upon as a matter of principle. It is an essentially practical issue. Almost all courts have eventually acknowledged the legality of peaceful picketing by employees engaged in a lawful strike. Some courts, particularly that of New York, find it easy to accept peaceful picketing as an organizational device in the absence of a strike. Other courts, permitting only strikers to picket, believe that only those workmen who have a grievance against their employer concerning immediate conditions of employment should be allowed to compel reform by this device. Apparently they believe that outside or "stranger" pickets can have no legitimate grievance to publicize and therefore interpret stranger picketing as the gratuitous infliction of harm. Such courts refuse to concede that all union labor in a particular industry has an interest in organizing all of the plants throughout an industry. They will not see that as long as some of these plants remain open shops, the business of the unionized plants is threatened by the competition of non-union made products which are cheaper because of the wage differential and that

1. Thornhill v. Alabama, 60 Sup. Ct. 736 (1940); Carlson v. California, 60 Sup. Ct. 746 (1940).

a threat to the business of a unionized employer is a threat to the security of the union workmen whose wages must be lowered to meet this competition.

Recognition of this interest has led some courts to allow peaceful stranger picketing as an organizational device. Other courts allow unions to organize competing open shops only by the frequently impracticable method of privately persuading enough individual workmen to join the union so that an effective strike can be called. At that point only will they let the plant be picketed and then only by actual strikers. Such courts forbid stranger picketing on the untenable ground that union employees in competing plants have no grievance against open shop producers. The more liberal courts take a broad view of the conflicting interests involved and realize that labor unionism implies not only competition between union and non-union producers in the same industry but also between the unions on the one hand and the open shop producers as well as their non-union employees on the other.

In this issue over stranger picketing the validity of the entire union economic program is at stake. Courts which have conceded the legality of limited union coercive devices like strikes for wages and hours and incidental peaceful picketing, are making their last stand against the logical extension of the labor union principle—federated monopoly or control over all jobs in all industries. Our courts have long been committed in principle to the legality of collective economic coercion designed to further the interests of industrial groups. They have never presumed to question either the economic wisdom of the objectives pursued by industrial or commercial group coercion or the peaceful means adopted to achieve them. Indeed, they probably evolved the term "competition" to signify these commercial policies of which they approved. The courts have always preferred to leave the regulation of this system to the legislatures. Only when a new type of group enterprise called organized labor entered the industrial conflict with the weapon of economic coercion did it become clear that our courts had developed a body of legal principle and policy applicable to a world in which, consciously or unwittingly, they intended capitalistic enterprise to dominate.

In a society where productive enterprise is initiated by private investment, the judicial philosophy of the past cannot be lightly dismissed. The cultural patterns of centuries dictated this position, and it would be surprising if all who believed in it were to abandon it easily. Several millions of our citizens are now questioning the principles of our economic culture as they were enunciated by judges. They are asking the courts to apply the common-law principles of competition and free enterprise to the activities of labor unions. In organized labor's self-help campaigns our courts are not dealing with sporadic illegality. They are dealing with a determined bid for new cultural values made by the most articulate members of our largest class in society—labor and wage earners. Labor leaders have used direct methods because they have appreciated the futility of seeking reforms politically until they had achieved pervasive organization. Our courts view with alarm the violation of traditional economic dogma in the constant attempts of unions to secure higher wages and shorter work days, immediate rewards which union leaders must produce if they are to weld otherwise apathetic workmen into the pervasive organizations essential to the achievement of political power. They are skeptical regarding the social reform features of labor unionism when they perceive leaders who have lost sight of social objectives and have turned their particular unions into pressure groups dedicated solely to their own self-aggrandisement. They are shocked to see unions under the control of common thugs and gangsters and to observe paper unions validly chartered by a legitimate federation but masquerading as a social reform to conceal the shake-downs of small tradesmen by hoodlums and racketeers.

Our courts naturally hesitate to vest the unions with unlimited privilege to compel universal organization of labor. With some reason they wonder why the unions, which they regard as no better than another type of business monopoly for gain, should expect to secure special privileges to coerce others and should be so bitter when the economic coercive defenses of industry are not curtailed. These courts no doubt deprecate what is commonly considered the best reason for entrusting the unions with almost unlimited coercive economic power—the fact that labor unionism cannot succeed at all unless it achieves throughout every industry and wage-paid occupation to be unionized a universal control of employment and unquestioned collective bargaining power. Such judges naturally appreciate the need for "evening up" the respective bargaining positions of employers and workmen; but they probably do not recognize any necessity for permitting the unions to destroy the business of any enterpriser who happens to be unwilling to conduct his affairs on the basis of "union made" economics. They have undoubtedly come to realize that big business has in the past been allowed to accumulate too much power over small business men and workmen alike. But they probably believe the panacea to be not the creation of rival groups with greater power so much as the depletion of the power accorded to corporate enterprises and regulation of the power created by labor organizations through legislation practically directed at the needs of workingmen for collective representation. Some of these judges obviously resent the position taken by the government, whether or not it was in response to political exigencies, as an official adoption of an economics of pressure groups evolved by the groups themselves for their own self-interest, regardless of its effect on society in general.

If these considerations are not apparent in judicial opinions directed against the extension of peaceful stranger picketing, they are at least implicit in every one of them. In the absence of legislation designed to expand the organizational privileges of unions, judges can hardly be blamed for allowing such considerations to influence their decisions. But the widespread adoption of anti-injunction statutes more or less forecloses continued judicial resistance of this sort. These statutes, of course, were primarily aimed at curtailing the bad judicial habit of issuing injunctions too freely and casually against coercive union tactics. They were supported by conservatives who were no lovers of unionism but who feared that the courts were developing a power to condemn unpopular economic activities without adequate trial, a practice which they feared might endanger imbedded political and constitutional traditions of due process. Although detailed discussion of the abuses of injunctive power in labor cases does not seem appropriate in this article, some discussion of the effect of anti-injunction statutes on the development of union economic coercion through peaceful picketing is important.

II

Section 20 of the Clayton Act was the first significant legislative undertaking to curtail the abuse of the

injunctive power against labor unions. But this measure proved abortive, the Supreme Court declaring it merely to restate the common law.[2] The presence of such qualifying words as "peacefully" and "lawfully" rendered Congress' description of non-enjoinable union coercive activities utterly meaningless as far as introducing any change was concerned. Furthermore, the court was convinced that a "dispute concerning terms and conditions of employment" could refer only to the strikes of employees complaining of grievances against their own immediate employers, and could not include the organizational activities from without of a union moving in upon an open shop in an attempt to unionize it.

In the same year in which this was decided, however, the Supreme Court seemed to concede the legality of extremely limited stranger picketing. In the Tri-Cities case,[3] Chief Justice Taft grudgingly admitted that the use of one or two pickets at each gate of a factory had become permissible *at common law*, at the same time re-emphasizing the fact that section 20 of the Clayton Act applied only to pickets who were *on strike* or in a temporarily suspended relationship of proximate employment with the picketed employer. Under consideration at the same term of court was *Truax v. Corrigan*,[4] a case arising out of one of the many state anti-injunction statutes modeled almost exactly after section 20 of the Clayton Act. The Arizona Supreme Court,[5] had refused to enjoin raucous and libelous picketing of the complainant's restaurant by a waiters' union and the case was appealed to the highest federal court. In his opinion Chief Justice Taft declared that the state act was unconstitutional *as construed* by the Arizona court, the decision appearing almost on the heels of the Tri-Cities case in which he had upheld the practically identical provision in the Clayton Act.

Truax v. Corrigan, in a way, is a legal curiosity. Arizona was apparently under no obligation to provide injunctive relief at all against union coercive activities, and if it had not enacted the statute involved, a decision denying the appropriateness of an injunction to protect business good will would at that date have been unassailable in the federal courts. But because a statute was involved, the defeated litigant could appeal to the highest federal court for its opinion on the constitutionality of the act under the Fourteenth Amendment. In an opinion which still baffles good lawyers, Chief Justice Taft declared that the Arizona statute, as construed (in other words, the Arizona court's decision) was a denial of due process and a violation of the equal protection clause. No state, he declared, may enact a law which permits one group (employers) to be subjected to the tortious activities of another group which remains immune, by virtue of such statute, from the only practicable remedy available. He obviously believed that the selection of organized labor as a class whose harmful activities were to be made non-enjoinable and actionable only in suits for damages, was arbitrary and capricious, resting upon no reasonable classification. This decision did not, of course, specifically establish that state anti-injunction acts of this type must not be locally construed so as to render stranger picketing non-enjoinable; but the implied warning almost to that effect was fairly plain, and no state court thereafter undertook to suggest that this type of act applied to picketing of non-strikers.

But these cases occasioned Mr. Justice Brandeis' scornful and carefully documented dissents[6] which have become the basis of reform measures. He pointed out the interest which every union has in organizing competing open shops throughout its industry if it is to protect itself from the undermining influences of sub-union standard competition, whether or not the workmen in such open shops are satisfied with or apathetic about local working conditions. His point of view inspired Professor Frankfurter to draft and propose the present Norris-LaGuardia Act,[7] in which the term "labor dispute" was painstakingly defined to include organizational activities from without and in which such activities as peaceful stranger picketing were rendered non-enjoinable. After its passage in 1932, several states shortly adopted similar acts, Wisconsin anticipating Congress by a year.

Now nothing could be clearer than the determination of legislatures enacting this new type of anti-injunction law to render non-enjoinable all union economic coercion, whether or not the proximate relationship of employer and employee ever had existed between the union in question and the employer it sought to organize. Hence it seemed a foregone conclusion that under this type of law *peaceful* stranger picketing could not be restrained. Nevertheless, most of the district and appellate federal courts decided otherwise. But the New York and Wisconsin courts gave this term its unmistakable meaning. Indeed, the first case to reach the United States Supreme Court on this issue, *Senn v. Tile Layers' Union*,[8] arose on appeal from the Wisconsin court.[9] The facts of this case presented the pitiful plight of a small tile laying contractor who hired but one helper and who eked out a living from a two thousand dollar a year business by laying tiles on his own jobs. The tile layers' union requested him to become unionized and he agreed to do so if he might continue his practice of doing a journeyman tile layer's work. But the union would not relax its rule forbidding this practice. Senn thereupon refused to unionize and as a consequence every job he took was persistently picketed by the union, to the virtual ruin of his business. Here was a case which starkly revealed the aims and needs of unionism and the ruthless effects of union economics not only upon small business but also upon the consuming community. Only one who has completely dedicated himself to labor unionism, "right or wrong," could wish for union success in this case. And yet under the Norris-LaGuardia type of statute there was no question that the union *must* win, the only issue being whether or not the picketing should be enjoined. The union interest was clear; the existence of a "labor dispute" within the plain meaning of the Wisconsin Act was beyond doubt. Those who dislike the federal Supreme Court's decision upholding the Wisconsin court's refusal to allow injunctive relief must admit that unless Congress and state legislatures have no constitutional power to enact such laws, affirmance was inevitable and proper.

Senn, of course, directed his attack against the legislative power to enact such a provision; but he got nowhere. One would have supposed that Mr. Justice Brandeis would have been content to rest his decision on the thesis that the legislature has the power to render non-enjoinable, if not to legalize outright (as the Wisconsin legislature had done) the exercise of

2. Duplex P. P. Co. v. Deering, 254 U. S. 443 (1940).
3. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921).
4. Truax v. Corrigan, 257 U. S. 312 (1921).
5. Truax v. Corrigan, 20 Ariz. 7.
6. In the Duplex and Truax cases, supra notes 3 and 4.
7. 47 U. S. Stat. 70, ch. 90 (1932).
8. 301 U. S. 468.
9. 268 N.W. 274.

economic coercion by labor unions as well as by business organizations. Actually he went much farther. He declared that the legislature *could* not have prohibited *peaceful* stranger picketing if it had wanted to do so, because *all* peaceful picketing is an exercise of constitutionally guaranteed "freedom of speech." Thus, he continued, the union conduct having been peaceful and non-libelous, *Truax v. Corrigan* was utterly irrelevant because the legislature had merely acknowledged the non-enjoinability of conduct which amounted to the exercise of freedom of speech; and nobody has a constitutional right to a remedy against the lawful conduct of others.

In the opinion of many who believe that labor unions should share the same civil rights of combination, of free enterprise and of the use of economic coercion that business men have always enjoyed, Justice Brandeis overreached himself in the Senn case. Although some of his observations were pointed, his main ideas expressed therein hardly bear analysis. Nothing in the Constitution, he declared, "forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window displays." Picketing he asserted to be merely the union method of advertising—"to win the patronage of the public" so necessary to gaining a livelihood. Those who believe that modern advertising has become a highly organized pressure campaign designed to undermine sales resistance and is a wasteful appendage to the cost of goods as well as a stimulant to unwarranted credit extension, better restricted than extended into new fields, should remember that its very existence may prevent labor unions from securing an adequate medium for publicising their interests. For many intelligent people believe commercial advertising to have given big business such a control of the press that impartial presentation of social and political issues, much less of labor's version of union aims, is virtually impossible through such a medium, organized labor having no opportunity for practical freedom of speech to state their economic and social views in the conventional manner.

Mr. Justice Brandeis' denomination of peaceful picketing as an expression of freedom of speech, his astute circumvention by this device of the doctrine of *Truax v. Corrigan*, and his identification of peaceful picketing with business advertising, have pleased all partisans of organized labor. But reflective citizens might well ask whether or not extension of questionable publicity pressures into a new field of enterprise is the most effective means of dealing with established abuses of the press. By implication he invests both types of publicity pressures with the dignity of freedom of speech, thereby placing them beyond the reach of what many might believe to be desirable legislative regulation. But aside from this, many people believe even peaceful picketing to be effective, when it is, not because it appeals to or persuades others in the way conventional advertising does but because it annoys patrons of the picketed enterprise and creates an apprehension of trouble to be avoided even at a considerable sacrifice. Although many no doubt respond to picketing through sympathy toward the aims of labor unions, it is unlikely that any patron or consumer was ever influenced by a picket line in order to secure any positive advantage to himself. Those who are influenced by ordinary commercial advertising probably expect to get more for their money; but those who are influenced by picket lines just as probably expect less to secure any affirmative advantage than to avoid any trouble by cooperating with the unions. Naturally one should entertain no illusions concerning the motivations of those who are influenced by the coercive economic devices ordinarily employed by business combinations, any more than he should regarding the motives of enterprisers who respond to the compulsions of strikes and union boycotts. In both cases the objects of pressure react as they do to avoid trouble. But the pressures from which they react are those created through the collective exercise of the ordinary civil liberties men enjoy to dispose of their money, their business relationships and their services as they see fit. It is, however, unlikely that anyone ever responded to commercial advertising in order to avoid trouble. He "obeys that impulse" because he is convinced on grounds of self-interests. He may unwittingly have responded to a subtle pressure; but it was not the kind of response that was imposed upon Senn and his prospective customers to deal only with unionized tilers or to suffer the annoyance and depletion of income that almost always accompany picketing.

When he characterized the picketing in the Senn case as advertising, Mr. Justice Brandeis interpreted the union conduct not only as an attempt to persuade Senn to become unionized but also as an undertaking to convince all who would like tiles laid and all prospective workmen on such jobs to deal only with the union. He did not relate the purported advantages of such a course of action to anyone except union workingmen, whose gain, if any, was to be figured only in terms of the elimination of cheaper non-union competition—in short, as a monopoly of tile laying for unionized enterprises. It is hard to see, therefore, how anyone could regard this picketing as advertising unless he were convinced that labor unionism is absolutely essential for social good and that non-union enterprise is correspondingly a social evil. Perhaps, however, it is fairer to ascribe Mr. Brandeis' views to confusion arising from an enthusiastic insistence upon freedom of the unions to state their side of the argument in any peaceful, non-violent manner they choose, regardless of the consequences. But the immediate *practical* effect of the decision was the destruction of Senn's business because people wanting tile laid do not want their premises picketed. To justify as advertising the deliberate destruction of another's business in order to further union enterprise which admittedly cannot be economically successful without elimination of non-union competition seems to be misusing plain English. Nor does the reminder that business men destroy each other's enterprises by ordinary competitive efforts which involve the use of advertising mitigate this impression. Such methods at least depend largely upon impersonal appeal of pecuniary interest to the public—not upon talking down the business methods of particular competitors or upon making customers afraid to deal with such competitors.

The most significant effects of the interpretation placed in the Senn case upon the Norris-LaGuardia type of anti-injunction act can be briefly set forth. Suppose an employer bargains and contracts with one of two bona fide labor unions competing for employment. Under the Senn case, aside from the freedom of speech argument, the employer must put up with stranger picketing by the "out" union, no matter how ruinous it may be. And if he breaks his contract with the "in" union because of the pressure exerted by the picketing, he may be held for breach of contract and may be subjected to picketing in turn by the ousted union. In

this way, enterprises dependent upon employees may be sacrificed to the cross-fire of business competition between two or more rival unions, presumably until one of the unions becomes so powerful it can suppress all efforts to compete with it. The New York court, faced with this situation prior to the passage of its present anti-injunction act, asked how it could enjoin the "out" union without giving "a death blow to legitimate labor activities."[10] The court concluded by remarking: "It is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict." This is no doubt a good answer for a court to make in such a situation; but it only emphasizes the lack of some government agency to regulate the use of union economic coercive power to protect the interests of business men who do not care which union they deal with so long as they may purchase peace and keep it.

This, however, is only by way of background to one of the most exasperating aspects of peaceful stranger picketing in present day labor law. The National Labor Relations Act and its state prototypes have set up agencies to insure autonomous organization and genuine collective bargaining to workers. Under the federal act, for example, the Board undertakes to poll the employees in an enterprise and to certify to the employer the union with which he must bargain. No longer does an employer within the Board's jurisdiction have the privilege of dealing with rival unions and of selecting for the representative of his men that one from which he will gain the most advantage. And yet if he bargains and contracts with the certified union, he may be exposed to the persistent and ruinous picketing of one or more outside unions which sought to become the bargaining representative of his men. This type of case has arisen repeatedly[11] and it seems beyond any doubt that the prevailing judicial view under the existing labor relations acts correctly permits such stranger picketing by the "out" union. The only justification for such a state of affairs is not, of course, to afford an opportunity for pressure on the employer. He no longer has any choice in the matter. It can be only to enable the "out" union to persuade his employees to change their union affiliations. The fact that the "in" union has a contract with the employer, presumably embodying terms of employment for a fixed period, seems to have been overlooked in the shuffle.

Now it does not require a legal training nor an unusual instruction in the nature of relative civil rights to appreciate the folly of this situation. To do nothing about it legislatively is to leave enormous potentialities for harm in the hands of labor unions intent only upon increasing their own spheres of influence and upon getting as much as they can without too much regard for the normal source of income for employed men. One of the obvious tasks of a government which has gone far to secure the right of universal union organization and collective bargaining for labor is to develop some sort of control over the use of the resulting power. It seems a poor sort of answer to this observation to say that government has been lax about curtailing the use of economic power by big business and that until it mends its ways in that respect, labor unions are entitled to use all manner of peaceful coercion in any way they see fit to promote their interests. Many of our most recent laws *are* directed against the abuses of power by big business; and many of our citizens sincerely believe that the balance of advantage as between industry and labor has swung considerably toward the latter and that some sort of compensating regulation of growing union power is overdue. Whatever the corrective may be—a regulatory commission or self-executing restrictions on certain types of picketing—Mr. Justice Brandeis' views in the Senn case and the present court's recent commitments on picketing, to be discussed in the concluding section of this article, may seriously jeopardize effective reform.

In the meantime unions are extending into new fields the use of peaceful stranger picketing as a coercive device. A meat workers' union, unable by direct picketing of the factory to unionize an open shop manufacturer whose cheaper products competed ruinously with similar union made goods, successfully picketed the retail outlets of the product. The New York Court of Appeals denied[12] injunctive relief because of the obvious existence of a labor dispute, basing its decision not on the fact that the retail shopkeeper's employment policy was anti-union (he hired nobody and the union was not concerned with this) but on the fact that as long as he gained pecuniary advantage by carrying a cheaper and more saleable product than that put out by union shops, he was supporting and had a "unity of interest" with the non-union manufacturer and was harming the union. Against this continued harm, the court said, the union might, free from injunction, picket *the non-union product* in front of the retail shop as long as they refrained from addressing their remarks at the shopkeeper himself. The fact that patrons ceased entering the shop for *all* purposes, thus enabling the union to ruin the shopkeeper unless he sold what they wanted him to carry, no doubt consoled the meat workers for not being permitted to condemn the shopkeeper directly as unfair to organized labor!

By introducing this distinction between picketing the product sold and picketing the seller generally, the New York court has placed itself in an untenable position. There seems to be little doubt that as long as the major plank of organized labor's economic program, on which everything else seems to rest, is the absolute need to eliminate all non-union competition of union-made products—in other words, to create a universal monopoly of employees by the unions—and as long as the courts accept this need as the justification for the use of their economic coercion, then anybody supporting a non-union industry in any way is an enemy of the unions and is working contrary to their interests. Such a situation has all the earmarks of a dispute between the union and the shopkeeper, even within the wording of the Norris-LaGuardia type of anti-injunction statute such as that in New York. For this statute reads that "a case shall be held to involve or grow out of a labor dispute when the case involves persons who have a direct or indirect interest therein: . . . or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined)." In a definitional section it appears that a "person participating or interested" is a person or union against whom relief is sought and who is engaged in the industry in which the dispute occurs, "or has a direct or indirect interest therein," and the term "labor dispute" includes "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." In intimating its willingness

10. Stillwell theatre, Inc. v. Kaplan, 259 N. Y. 405 (1932).

11. Compare, e.g., Cupples Co. v. A. F. of L., 20 Fed. Supp. 894 (E. D. Mo., 1937) and Oberman and Co. v. U. G. W. A., 21 Fed. Supp. 20 (W. D. Mo., 1937).

12. Goldfinger v. Feintuch, 276 N. Y. 281 (1937).

to enjoin picketing of the shopkeeper himself in contradistinction to the picketing in front of his shop of the product he sold, the New York court apparently regards as enjoinable the picketing of any enterprise, such as an apartment house or hotel, which uses the services of a non-union independent contractor, for instance, a window washing agency, or of a retail store that advertises in a non-unionized newspaper. This position, no matter how sensible it may seem as a matter of policy, appears to be contrary to the wording of the anti-injunction statute and inconsistent with the court's *decision* in the meatworkers' case described above. For, although in that case the picketers requested patrons merely to refrain from purchasing the non-union made product and in the latter cases the picketing could not be directed at a product but could only be directed at the enterprise itself for supporting a non-union business, nevertheless, the net practical effect in the former case was to condemn the shopkeeper altogether for selling the product in question.

These cases are likened to secondary boycotts; but of course they are more than that. Organized consumer refusal to deal with stores purveying a non-union made product or to induce cessation of its sale—a typical secondary boycott pressure, whether exercised by labor unionists as consumers or by the general public—seems relatively acceptable. The picketing described above is, however, more than this. It is an attempt, at a place where neither customers nor the enterpriser concerned can miss its full effect, to dissuade patrons from entering a store by conduct calculated to annoy and to make them experience a feeling of social ostracism or some feeling of discomfort if they do. Some patrons would no doubt respond through sympathy toward the union; but most people are not easily induced to pay more for their household necessities in order to further the interests of someone else. At the same time, almost everyone would prefer to pay some sort of tribute in order to obviate any chance of inconvenience or trouble. This picketing compels storekeepers to abandon obviously sound economic practices in order to prevent interference in a course of business mutually beneficial to themselves and to all consumers. As to whether or not all this is true, any intelligent person's opinion is quite as good as that of any judge sitting on any court in the land. Granting labor unions the right collectively to refrain from purchasing non-union made products, from working for a manufacturer or user of such products, or even to picket under certain circumstances the premises of an employer who operates without union workmen, it is another thing to let them force retailers and enterprisers to discontinue the sale and use of non-union made goods and non-union rendered services (other than by direct employment) by actively creating barriers between them and their customers. The claim that such coercive union practices are justifiable as constitutional freedom of speech and are merely the exercise of ordinary civil rights available to all is a perversion of an American ideal which betrays an odd understanding of one of this country's most precious heritages.

III

Freedom of speech, like freedom of enterprise and other concepts dealing with liberty of action, are notions which form the very cornerstones of American democracy. But we should constantly remember that they *are* concepts and are not susceptible of precise definition. Practically, they are functions of a way of life which in the present day world seems very dear to most of us. Freedom of speech and expression historically deals with the unrestricted dissemination and communication of ideas, chiefly concerning political and economic issues. Our system of government is committed to the faith that the good sense of our populace is the best defense against the effusions of crackpots or against the more rigorous claims and propaganda of disciples representing undesirable political or social folk-ways. We believe that only general good can sift through the sieve of public opinion, so we let all sorts of discussion be thrown into the hopper.

But freedom of speech deals with the unrestricted expression of *ideas*. And in the United States labor organizations have always been allowed to talk, no effort ever having been made to prevent them from discussing their programs as freely as they choose. Amusingly enough, labor unionists have always been reluctant to discuss openly and frankly the main underlying ideas of their economic program. They do not seem anxious to popularize the notion that labor unionism cannot succeed until all independent non-union enterprise is suppressed and the large national unions have achieved a monopolistic control of employment. They emphasize the benefits of unionism to union members, a result which many economists question as long as these benefits are secured through collective bargaining; but they do not discuss the consequences of universal unionism to consumers in general. Revelation of the essentially selfish motives of labor leaders (perfectly respectable motives, to be sure, and the same which have always been behind business enterprise) they have always avoided and they have rather attempted to disguise unionism as a large scale altruistic endeavor. As a consequence they have won the support of thousands of intellectual leaders who are actuated by the social movement aspects of unionism and who seem to have ignored the dangers of the sort of power which federated universal closed shops may bring.

Now if freedom of speech is to prove a valuable social asset, it will be because unrestricted expression educates and convinces others intellectually. It is submitted that peaceful picketing is not an argument intended to achieve an intellectual conquest. It is, as the foregoing discussion must have made amply clear, a type of coercion. The only intellectual conviction to which it leads is the understanding that if the picketed enterprise does not give in, or if patrons or applicants for jobs do not cease dealing with him, they will all eventually wish they had.

True liberals in this country no longer look askance at economic compulsion. But to call such coercion constitutionally guaranteed freedom of speech, thereby placing it beyond the reach of regulatory legislation deemed practicable by the majority, seems ridiculous policy and sheer misunderstanding of the concept under discussion. Let the unions employ all manner of persuasion (as contrasted to coercion) and call that freedom of speech. But when they insist upon "expressing" themselves where everyone knows that their "arguments" win, not because of any intellectual worth but chiefly because of annoyance and fear, they strain the concept beyond all sensible meaning. And when the Supreme Court of the United States virtually forecloses[13] all local attempts to regulate the use of peaceful picketing, "stranger" or other, it is enough to drive erstwhile liberals, who were proud of the label, into some other category of political man.

But the whole matter is much more serious than just this. For years the "Old Court" was under fire

13. See Thornhill and Carlson cases, supra note 1.

because of its doctrine of "substantive due process" developed to make possible the invalidation of local legislative experiments. It now seems from the picketing cases of last Spring that the "New Court" is perpetuating this error by using the Fourteenth Amendment to establish its conception of the guaranties of liberty set forth in the First Amendment. Perhaps this recourse is not as deplorable as has been suggested; but a more recent decision sharpens the discussion. It now appears that whereas labor unionists have complete freedom of speech and expression, Jehovah's Witnesses are not free to draw and act upon their own conclusions concerning the relative merits of saluting or not saluting the flag if they wish to continue attending the public schools.[14] This situation is most painful to many of us who can only infer that it is due either to certain judicial "economic predilections" or to the fact that labor is highly organized whereas Jehovah's Witnesses are not.

A government of men is a practical affair. It covers such a vast and heterogeneous maze of interests and opinions that general principles infused with the practical wisdom of judges constitute an essential element in its administration. But legislation effected by popular representation and reflecting political sentiment seems far more valuable in the world of today. The Constitution affords ample powers to and checks upon this part of government. Unpatriotic elements can be dealt with legislatively during times of emergency. In the meantime the function of our judiciary is rather to make clear these powers and checks than to supply social policy where it believes it to have been inadequately set forth by the legislatures. Unless we wish to live in a society where all enterprise and *all social activity*, however private, is subjected to the coercive influences of annoyance and fear created by some conflicting group interest or prejudice, we had best save for our legislatures the means of effective regulation of private group pressures which the founding fathers no doubt intended to include in the Constitution. It is disquieting to hear proponents of organized labor applaud the picketing cases of last Spring and then condemn a manufacturer who, contrary to the terms of the Wagner Act, insists upon telling his employees exactly what he thinks of a certain labor union and why. Nobody appreciates the need for and value of freedom of speech more than university professors engaged in teaching social science and law. But surely nobody appreciates any more than these same men the absolute need for the legislative power to regulate *all* social forces, whether they be speech or action, under circumstances showing practical need for curbing group pressures, in order to achieve a workable and harmonious society. And when such circumstances may be said to exist should, as always in the past, remain a matter of popular opinion, to be expressed ultimately in democratic fashion at the polls.

14. Minersville School District v. Gobitis, 60 Sup. Ct., 1010 (1940).

RECENT LEGAL PERIODICALS

By KENNETH C. SEARS
Professor of Law, University of Chicago Law School

CARRIERS

War Time Control of American Railways, by Clyde B. Aitchison, in 26 Va. L. Rev. 847. (May, 1940.)

The condition of the world makes this discussion timely and important. In most European countries the primary importance of railways is for military use. The development in Great Britain and the United States was for the purpose of favoring private ownership. War violently changes the conditions under which railways perform their functions and its immediate effect is a progressive inability of the railways to perform their duties adequately. It was during the Civil War that railways developed as a new arm in war. The Confederacy adopted a let-alone policy of freedom from military control. This proved to be a handicap. The Union tried two policies. The policy of the subordinates of General Pope in treating the railways as subject to their personal command regardless of the railway authorities proved to be unfortunate. Then the Union shifted to another policy, viz., congressional authority to take over the railways and place them by Presidential order under an experienced railway man as the military director of them. This latter plan worked well. During the World War Great Britain assumed possession and control of their railways "within the hour after the declaration of war." In the United States we struggled with traffic congestion and, while Congress was investigating, the President assumed control December 28, 1917. Up to that time we had disregarded our Civil War experience. Since then economic changes have had their effect. Railways are now better prepared to meet the demands of war. Due to the increase of other agencies it is probable that the railways will not be requested to carry as large a proportion of the transportation as in the first World War. Nevertheless, certain modifications of existing laws are recommended just in case of an "emergency."

CRIMINAL ADMINISTRATION

The Federal Prosecutor, by Robert H. Jackson, in 31 Journal of Criminal Law and Criminology 3. (May-June, 1940).

At the Second Annual Conference of United States Attorneys, Attorney General Jackson made a brief address. The ideals expressed are so praiseworthy that they deserve to be remembered. Here are three of them: "Although the government technically loses its case, it has really won if justice has been done. . . Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. . . I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics." The district attorneys were advised that their greatest problem was in picking their cases; that all complaints could not even be investigated; and that if the Department of Justice "were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate." Warning was given against selecting victims for prosecution with a view of then seeking to ascertain if they had violated a statute. Courage was stated to be needed in handling so-called subversive activities. "Some of our soundest constitutional doctrines were once punished as subversive."

CRIMINAL ADMINISTRATION

The Problem of Sentence in the Criminal Law, by Mathew F. McGuire and Alexander Holtzoff, in 20 B. U. L. Rev. 423. (June, 1940.)

Two assistants to the Attorney General of the United States show up the striking disparity in the criminal sentences imposed by our federal district courts. "For the fiscal year ending June 30, 1939, the average sentence of imprisonment imposed in liquor cases varied between 1,825 days in one district, and 100 days in another; and in narcotic cases between 1,840 days in one district and 137 days in another." Likewise, in one district 62.4 per cent of all convicted defendants were placed on probation, but in another district only 4 per cent received that treatment. Obviously, this is not even-handed justice and it creates a disciplinary problem within prisons. England has made an improvement in this respect by permitting a defendant to appeal, with permission, from his sentence. The appellate court has the power to decrease or increase the sentence. Not much use of this general idea has been made in this country, but considerable use has been made of the indeterminate sentence scheme. The California type of indeterminate sentence gives no discretion to the court but fixes by statute the minimum and maximum sentences. A committee of the Conference of Senior Circuit Judges is considering whether the United States should adopt an indeterminate sentence plan or the plan that would permit the Circuit Courts of Appeals to increase or reduce sentences.

CRIMINAL LAW

The Lindbergh Law, by Robert C. Finley, in 28 Geo. L. J. 908. (April, 1940.)

After a statement of the history of the Lindbergh Law the author, who is a special attorney in the Department of Justice, presents a surprise. He apparently is not convinced that the law is within the federal constitution. He seems sympathetic with the opposition to the passage of the law, "unless absolutely necessary," that was manifested by Chairman Sumners of the House Judiciary Committee. More certain is the author's opposition to the construction and application of the act in the Skelly, Berman, Shannon, and Gooch cases. Yet, there seems to be a certain amount of pride in the fact "that the combined effort of the three branches of the federal government has been the determining factor in arriving at that degree of effective governmental control of the kidnaping racket which is apparent in this country today." Those who are not convinced of the author's doubts and criticisms will take comfort, by way of wishful thinking perhaps, that the author's opinions "shall in no manner be construed to be official representations of the Department of Justice."

INTERNATIONAL LAW

International Law and the Present War, by Frederic Rene Coudert, in 15 Notre Dame Lawyer 271. (May, 1940.)

Though written last fall, Mr. Coudert's observations are still of interest. Despite pessimism it is well to remember that international law is part of the common law and of our American law as manifested in many reported cases. Such cases likely will become more frequent. Nor is international law of peace more uncertain than constitutional law. The difficulty is with the law of the sea in time of war. Norway is complimented for a prompt, courageous, and correct application of international law in the case of the American vessel, City of Flint. Other items of interest are: (1) a dictum by the Privy Council in 1916 that an order of the King in council could not override a plain rule of international law; (2) a treaty between the United States, Great Britain, France, Italy, and Japan in 1922 prohibiting the use of submarines as commerce destroyers; (3) the "neutrality legislation" practically abandons the old doctrine of the freedom of the seas for which we fought in 1812 and again in 1917; (4) the transfer of American ships to the Panama flag was legal; and (5) the Declaration of Panama which would immunize the American continent from belligerent action for hundreds of miles beyond its coasts would be a radical departure from international law but if enforced might become a recognized doctrine, as is the Monroe Doctrine. "Only when some federative world plan becomes a reality, and it is realized among the nations that their major interest is in the preservation of peace, through law, will this age-long conflict cease."

LABOR RELATIONS

The State Legislatures and Unionism, by Russell A. Smith and William J. DeLancey, in 38 Mich. L. Rev. 987. (May, 1940.)

The lawyer in search of information concerning legislation in the states concerning employer—employee relations should consult this article. Like most articles which are essentially devoted to compiling information it makes dull reading but it appears to be carefully done. The first part is concerned with legislative restrictions on employers and includes restrictions on their power to contract, their power to control the labor market, and a comment on the seven state labor relations acts. The second part deals with employee restrictions, including the strike, picketing, and boycotting. The final part discusses statutes which attempt to provide peaceful settlement of controversies, including mediation, voluntary and involuntary arbitration.

POLITICS

Sections, Classes, and the Federal Constitution, by Arthur N. Holcombe, in 20 B. U. L. Rev. 464. (June, 1940.)

A Harvard professor of government has presented a capital essay. The question is whether it is true, as argued by the Communists and Fascists, that the people of a modern state are divided into precisely two classes. In the convention of 1787 there was no wage-earner, artisan, independent handicraftsman, or small independent farmer. The upper class members came from three classes, viz., the landed interest, the commercial interest, and professional men who had close contacts with the great landowners and merchants. These constituted more than two-thirds of the delegates, but it was difficult for them to unite. Of the seventeen middle class delegates, fifteen were professional men. Most of them exerted little influence, but the others, particularly the Connecticut delegation, "spoke with the strength of a multitude." This was true on the problems of the direct election of members of one house of Congress, the qualifications of the voters to elect them, and the qualifications of the members of both branches of Congress. The greatest middle class achievement was the adoption of the Connecticut Compromise. This was a defeat for the Nationalists and the Confederationists, and a victory for the Federalists.

LEGAL ETHICS

Minnesota Supreme Court Warns Lawyer Against Testifying as Material Witness

IN a recent case, where a lawyer, who had witnessed a will, represented the proponent for probate, and the validity of the will was contested on the grounds that the testatrix lacked testamentary capacity and was unduly influenced by the beneficiary, the Supreme Court of Minnesota said:

> "What has been said disposes of the appeal on its merits. There is, however, another matter which we cannot overlook or refrain from discussing, much as we would like to avoid so doing. In *Ferraro v. Taylor*, 197 Minn. 5, 12, 265 N. W. 829, 833, we said: 'The practice of attorneys of furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence. . . . The good name and deservedly high standing of the Minnesota Bar require that the practice be stopped, for nothing short of actual corruption can more surely discredit the profession. . . . By appearing in the dual capacity of counsel and witness, and then necessarily by argument urging upon the judge, as trier of the facts, the truth of their own testimony, . . . counsel for plaintiff have subjected themselves to the results which automatically attend such a spectacle, for a lawyer, "occupying the attitude of both witness and attorney for his client, subjects his testimony to criticism, if not suspicion." . . . "In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension." (Citing cases.)
>
> "That applies with at least equal force here. When counsel learned that there was a contest to be heard he knew well enough that his testimony in the case was essential to proponent's success. To accept a retainer as her attorney was improper and unlawyerlike in these circumstances. It is to be hoped that no occasion will again arise which will make it necessary further to admonish counsel." *In re Stephens' Estate*, 293 N. W. 90, 93.

Last year the same practice was strongly condemned in *In re Haden*, 4 A. (2nd) 882.

Canon 19 provides: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client."

In Opinion 50, the Committee on Professional Ethics and Grievances of the American Bar Association held that an attorney can neither properly accept employment in a case, if he knows that he or his partner will be an essential witness, nor continue as trial counsel after he acquires such knowledge.

New York Attorney Disbarred for False Swearing

Attorney Samuel Lang was acquainted with Joseph Brickner and Julius Bernfeld since 1923 and knew that they had been in business as furriers and importers for more than thirty-five years and had been incorporated since 1925 under the name of Brickner & Bernfeld, Inc. He had represented them on various occasions. In 1936, they retained him to organize Frostland Fur Dyeing & Dressing Corporation, a New York corporation. On behalf of said corporation, he also negotiated with the Greenpoint Savings Bank for a lease of certain premises in Brooklyn. Said lease was submitted by the bank to his client, the Frostland Corporation, for execution, and was executed by Joseph Brickner as president of the corporation. Instead of using his own name, however, he signed the lease in the name of Joseph Friedman. Lang affixed his signature to the acknowledgment clause of the lease as a notary public, certifying therein that "Joseph Friedman" had appeared before him and duly acknowledged the execution of the instrument.

In a supplementary proceeding recently brought to ascertain the whereabouts of the officers of the Frostland Corporation, respondent testified under oath that he recalled the name of its president as being Friedman, that he did not know his first name but it commenced with a J; that he did not know Mr. Friedman very long before the incorporation. He further testified that he knew Joseph Friedman, the man who signed as president of the Frostland Corporation, to be known as Joseph Friedman; that he was introduced to him as such, and he executed the lease in that name.

It was only after Joseph Brickner had been located and examined and had admitted that he and Joseph Friedman were the same person that the respondent made a similar admission. In explanation of the foregoing facts and the giving of the aforesaid and other false and misleading testimony under oath in the supplementary proceedings, the respondent claimed that the original intention was to conceal from the trade the fact that Brickner & Bernfeld, Inc., had any connection with the Frostland Corporation; in other words, that they were conducting their own dressing and dyeing establishment in order to process skins imported by them less expensively than could be done by independent establishments. He claimed there was no thought of wrongdoing in the use by Brickner of the name Joseph Friedman. In further attempted explanation of his false testimony he alleged he had been irritated by the refusal of counsel for the plaintiff to grant an adjournment and therefore "proceeded to answer certain questions relating to Friedman with a mental reservation."

The Court said:

> "This effrontery does not aid the respondent's cause. His conduct in the supplementary proceedings is inexcusable and shows a deliberate attempt to exploit the original deception which he alleges was without wrongful intent. He had ample opportunity to correct his testimony but failed to do so."

The respondent was disbarred. *In re Lang*, 20 N. Y. S., 913, 915.

How Depraved a Lawyer Can Become!

In a disciplinary proceeding against an attorney, admitted to practice in New York but six years ago, it was shown that he aided and abetted attempts to divert to his uncle, in whose office he was employed, accident cases in which he knew other attorneys were employed; that he aided and abetted his uncle in permitting a disbarred attorney to hold himself out as his uncle and to practice law under his uncle's name; that he participated in misrepresentation to a client as to the status of her case and the amount of work done upon it; and that he participated in unlawful withholding

of moneys due clients, although it did not appear that any of the moneys withheld were applied to the attorney's own use. *In re Nadelweiss*, 20 N. Y. S. (2d) 773.

The attorney was disbarred.

Lawyer Disbarred for Inducing Client to Make False Claim

An official referee found that Esther Insel's woman client, a former domestic in her mother's home, had been injured by a fall, while descending the stairs from a sidewalk to a subway station of the Interborough Rapid Transit Company in New York City; that Miss Insel induced her client to claim that she was injured by falling into the space between the train and the platform and to persuade a friend to state falsely that she witnessed the accident; that Miss Insel induced both to sign false statements with reference to the accident and requested them to testify falsely on the trial; and that she attempted to obstruct the Accident Fraud Bureau's investigation by requesting her client to give false testimony when she appeared before that bureau. The false statements were sent to Attorney Morrison P. Paley, to whom Miss Insel was later married. He had them photostated, sent them to the Interborough Rapid Transit Company and thereafter prepared and served an unverified complaint on this fabricated claim, in which he appeared as attorney of record. Paley had conferences with the client and her friend and urged them to stick to their stories. He later consented to have his name stricken from the roll of attorneys rather than face charges arising out of this matter.

The referee concluded his report as follows:

> "I can state that in my entire career I was never more confident than I am in this proceeding that I have arrived at a correct decision and correctly judged witnesses and their credibility. I feel as certain as if I had heard the respondent and her husband confess that the facts are true as I find them. Nor have I ever been called upon to decide a matter in which I encountered and there were palpable, at least to me, so many devices resorted to, oral and written, and so much strategem displayed to conceal and camouflage fraud as were resorted to by the respondent and her husband from the initiation of the conspiracy, then in its execution in the face of the danger of exposure, and finally, in the preparation and bolstering up of a fabricated defense."

The Court added:

> "The record herein conclusively sustains the finding by the referee that the respondent has been guilty of professional misconduct. Her conduct in this, her first case, is a sad commentary upon the ethics of some of the persons now gaining admission to the Bar." *In re Insel*, 20 N. Y. S. (2d) 729, 733.

The respondent was disbarred.

Cincinnati Bar Association Launches Interneship Plan for Law Students

The first step in an interneship for young law graduates is being taken by the Cincinnati Bar Association's Committee on Junior Bar Activities with attempts to place graduates in private law offices this summer where they will work without other compensation than the practical experience thus to be obtained.

The second step is to be taken next year, when it is expected that arrangements can be made for an apprenticeship period in city, county and federal offices for law students about to begin their last year at school.

In such case the period of service will be about two months.

The plan recognizes that little time can be given in law school to the technique of law practice and that a person admitted to the bar still has many vitally important things to learn before he can be of service to a client. Many a highly useful bit of knowledge will be picked up by the student who gives his time to work in a public office, and equally useful knowledge will come to the graduate who is given the chance to perform miscellaneous tasks in a private law office and observe office routine.

The committee states that this program has been received enthusiastically by the law schools. Students and graduates will doubtless welcome it. All that remains now is to obtain the cooperation of the profession to make this a permanent activity, the committee said.

A letter from the committee has gone to each private office in the city, explaining the plan and asking the recipient to place one of the young graduates in his office on the terms outlined. It was explained that there will be no obligation on the part of the office to employ the graduate after his apprenticeship expires. It was expected, however, that in not a few cases the "interne" would be able so to ingratiate himself with the head of the office and make himself so useful that he would be offered a permanent connection. In any event he would have his first experience with actual practice under the guidance of an older lawyer.

Cleveland Bar Association Committee Proposes Canon on Fees

The Cleveland Bar Association's Committee on Professional Ethics is of the opinion that the charging of unconscionable fees should be inhibited by a Canon of Ethics and that such cases should come within the jurisdiction of the committee.

After observing that cases came to its attention last year in which the facts amounted to the obtaining of money under false pretenses, the committee's report said:

> "The experience of the committee during the year has convinced its members that there is a class of cases which on their face involve merely the amount of the fee but in relation to which there is really a serious, pernicious breach of trust with all the elements of moral turpitude.
>
> "We refer to cases, several of which have come to our attention, where a client in difficulty and yet, more or less in ignorance of his rights or obligations, seeks the advice of a lawyer.
>
> "The lawyer takes advantage of the client's ignorance in deliberately magnifying the extent of the client's jeopardy or the extent of the results which can be expected to be accomplished or the value of the services that he, the attorney, can render and by this putting the client in fear or thus subjecting him to coercion, secures the voluntary payment of fees out of all proportion to the jeopardy of the client, the results accomplished, the amount in dispute, or the ability of the client to pay.
>
> "No doubt some of the general rules would apply to such a case, but the trouble is that it is generally known that our committee does not have jurisdiction in mere fee disputes. A rule such as we suggest, given full publicity, we believe, would be helpful. Possibly, if the executive committee would specifically give this committee jurisdiction in such cases and fully publicize such fact, the effect we have in mind would be accomplished."

By Committee on Professional Ethics and Grievances.
HON. HERSCHEL W. ARANT, *Chairman.*

UNIVERSITY OF PENNSYLVANIA—200th ANNIVERSARY

THE University of Pennsylvania will commemorate the 200th anniversary of its origin with a Bicentennial Celebration the week following the ABA Convention. "Bicentennial Week" will begin on Monday, September 16, and is to close on Saturday, September 21. The celebration will include symposia on various timely topics; professional conferences; laboratory and clinical demonstrations; and Convocations for the conferring of honorary degrees. In addition, there will be alumni meetings, cultural and scientific exhibits, a water pageant, a fireworks display, and other attractions.

Some 500 colleges and universities and many learned societies, including the American Bar Association, will be represented at the celebration by official delegates. The list of distinguished guests and speakers will include 200 American and European scholars and leaders in various fields who will participate in the symposia and professional conferences. President Franklin D. Roosevelt and Sir Lyman Poore Duff, Chief Justice of Canada, will be among the recipients of honorary degrees.

The symposia and conferences, which constitute the program of the Bicentennial Conference, will be featured by lectures and papers in six general fields—the Fine Arts, Humanities, Medical Sciences, Natural Sciences, Religion, and the Social Sciences.

The offerings in the field of the Humanities are designed to bring out the continuity of culture, while the objective in the other fields is to reveal the trends of modern thought and the advances of science.

Thousands of the alumni will join in paying tribute to the University on Friday morning, September 20, at a Bicentennial meeting in the Dormitory Quadrangle. That afternoon there will be another impressive meeting, including a Convocation of the University Council, in Convention Hall, at which the honorary degrees will be given.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

The Friday morning program in the Quadrangle will include addresses by Dr. Thomas S. Gates, president of the University of Pennsylvania; former United States Senator George Wharton Pepper, an alumnus and trustee of the University; and Thomas I. Parkinson, president of the Equitable Life Assurance Society of the United States, who is chairman of the National Alumni Bicentennial Committee.

President Roosevelt and Sir Lyman Poore Duff will deliver addresses at the Convocation in Convention Hall on Friday afternoon. In addition, Associate Justice Owen J. Roberts, of the Supreme Court of the United States, a distinguished alumnus of the University of Pennsylvania, will deliver an address.

On Saturday morning, September 21, a further Convocation of University Council in Convention Hall will be held at which twenty-one honorary additional degrees will be conferred and the delegates representing colleges, universities and learned societies at the celebration will be formally presented.

President Gates will preside at the Saturday morning session and make an introductory address at the Convocation. There will also be addresses by Governor Arthur H. James, of Pennsylvania, and Dr. George Wm. McClelland, provost of the University of Pennsylvania.

The Saturday morning meeting will bring the Bicentennial Celebration to an end.

COLLEGE HALL
Which stands in the center of the Campus of the University of Pennsylvania, founded in 1740.

DORMITORY QUADRANGLE
University of Pennsylvania

AMERICAN BAR ASSOCIATION JOVRNAL

DEMOCRACY AND THE DRAFT

In view of the timeliness of the subject, we are printing in this issue, an article entitled "Legal Basis for Conscription," dealing with the legal aspects of the draft as disclosed by the decisions of the courts of the United States and with so much of the history of compulsory military service as might be helpful in the interpretation of that subject.

The article deals with that subject so completely and in such an informative and non-controversial a manner, that the bar will be spared much research which otherwise would have been necessary and will be aided in the formation of a sound opinion on a matter of vital importance.

Fortunately the question has been removed from the field of political controversy, but there are however important questions of public policy and of personal duty which it is opportune to consider.

Some there are in high places, who declare that they would not oppose compulsory military service if a state of war actually existed, but say that they oppose the exercise of that power until a state of war actually exists or is assuredly at hand. How grave a responsibility will rest upon the public official who advocates delay of preparation for such an emergency, if it comes and finds us not adequately prepared to meet it.

Those of us who a generation ago saw millions of our youth called to the colors without having been taught in advance the fundamentals of military training and discipline, cannot forget that the dangers which they were called upon to face were increased, and their value to the nation as its defenders was diminished, by their inexperience.

Others there are who oppose taking our young manhood from school, shop, or office, in pursuance of a plan which shall ultimately make all our man power familiar with the fundamentals of military science and thus made promptly available for National Defense. Some of those to whom the public has been accustomed to listen with respect now say that such a course foretokens the end of Democracy. Those who say that for a Democracy to put itself in a position where it is able to defend its present form of government and maintain its chosen manner of life, against those who seek to establish an autocratic form of government throughout the world, are forfeiting part of the high esteem in which they may have heretofore been held.

Our own experience with compulsory military service shows that the men so called to the colors, returned to civil life with no diminution of their loyalty to our form of government. Did the Grand Army of the Republic or the American Legion ever manifest evidence of hostility to Democracy?

Conscription lays the burden of National Defense on all and makes it lighter on each. If it be deferred until war actually comes, it must be administered in the haste and turmoil of an inexorable demand. If it comes now, it will be administered with better opportunity to consider the circumstances of individual cases.

EARLE WOOD EVANS

The Association lost a devoted worker, as well as an influential senior adviser, in the passing of Earle Wood Evans, of Kansas, who was President during the Association year 1933-34.

This rugged and successful lawyer "came up through the ranks" in Association work, and held many important posts, both before and after he was elevated to the chief office. He was one of the outstanding exponents of a vigorous policy for the Committee on Professional Ethics and Grievances, on which he served for years; and his leadership as chairman of the old General Council forecast an unopposed election to the presidency of the Association, for the year which ended with the Milwaukee meeting.

He exemplified the democratic and diversified character of the leadership of the Association, and the fact that its roots run deep among the practising lawyers of the smaller cities and towns throughout the country. This son of the plains had a capacity for friendship and for quiet counsel, which will be sorely missed at a time when the voice of experience is needed.

THE EXPLANATION AND DEFENSE OF FREE INSTITUTIONS

American lawyers have traditionally assumed it to be their especial duty to justify the orderly processes of constitutional government and to resist dangerous and destructive innovations which they deemed likely to impair fundamentals of the American system of liberty and justice under law. For the most part, this historic duty of defense has been discharged under peace-time conditions and by the familiar methods of public discussion and the rallying of public opinion. From time to time, however, the menace to free institutions in this hemisphere has come in the guise of armed conflict; and on those critical occasions the lawyers of this country have never been found wanting in their ability and readiness to do their full part.

Today the American people need all the leadership and guidance they can get, as to how a constitutional democracy can survive and keep its cherished freedoms, in a world which has turned totalitarian and has witnessed the downfall of successive democracies under mechanized attacks. It still is hard for many of our people to understand why or how there should be any doubt or difficulty about the security and immunity of free government in the Americas, even though Europe and Asia are being over-run by force and greed for territory and trade. Nevertheless, the consensus of informed judgment in this country is that security can be expected only if the United States is adequately and promptly prepared to resist, by force if need be, the invasion of this continent or this hemisphere by any totalitarian power. By most persons who have appraised the forces which have been loosed in the world, it is believed that without swift and adequate preparedness here, the rapacious leaders and powerful armies of Europe and Asia will not lay down their victorious arms until they have challenged and curbed the democratic institutions whose very existence would otherwise be a constant menace to their sway. The present-day modes of defense of constitutional government in this country therefore have to do with whole-hearted, sincere and expert preparedness for defense against armed force, with every ordinary political consideration subordinated to the supreme task.

Preparedness for defense will hardly become the paramount and whole-hearted objective unless and until there is a general and militant public opinion which insists that it be speedily accomplished, in the common cause. Under such circumstances, the duty and the opportunity of the lawyers in every community are clear. If in any community there is lack of understanding of the fairness and necessity of obligatory training and selective service in the common tasks of preparedness, the lawyers should be of great help in explaining and justifying the military obligation of citizenship,—an individual duty inherent in the American system from the earliest times. It should everywhere be made clear that under the spirit of our laws, and probably soon their letter, the individual who does less than the full duty for which he is called, in the defense of free institutions through work in factory, office, or farm, or through training and service in the armed forces, risks the loss of his status as a free man. Under modern conditions, the citizen's obligation of training to do his part is no less than his obligation to defend his country in actual wartime. Amateurs can no longer make an impromptu and improvised defense of America. Community organizations for the furtherance of these patriotic purposes have been formed in many localities, with lawyers in the lead.

Above all, there should be vigilance by all citizens that the United States need not abandon its basic freedoms in order to resist far-away dictators. An ancient Roman maxim declared that "When war comes, the laws go." — it should not and need not be so in America. An America worth defending is an America which stands in shining contrast to all which has followed the triumph of force in Europe.

Especially do we need the benefit of trustworthy and impartial fact-finding as to the causes of the unpreparedness of the French Republic and the collapse of the morale of its political and military leaders, in the very presence of imminent danger of attack. Those causes are not likely to be found in anything which will suggest a need for abandoning or modifying our American practice of self-government under the Constitution or for vesting untrammelled powers in any political agency. Our historic freedoms are not likely to be found inconsistent with full and prompt preparedness, once the people of the whole country make it clear that they expect action and adequate results without delay. An aroused and insistent public opinion will ensure the right answer to every doubt and uncertainty which besets those who are deeply concerned for the future of their country.

LAWYERS AND THE ART OF LIVING, II

THE Editorial Sanctum was pleased and flattered the other day to have a second visit from Mr. Sidereal, that famous lawyer from the Planet Mars, who has been visiting on Earth. After mutual felicitations, Mr. Sidereal referred with commendation to the Editorial in the July issue on the above topic, and said:

"A great many of your lawyer readers seem to have enjoyed your homily about The Art of Living; but some of them, I fear, gave it the wrong emphasis and application. Indeed few lawyers realize the close application of that particular art to the legal profession, and its realistic connection with their day-to-day affairs. For them the things you were talking about form a sort of aesthetic dream which has little to do with every-day professional life. Nothing could be further from the truth. The ideal professional career requires a constant study, throughout life, of the things about which you wrote."

This comment about the profession seems most cogent and fully justified. If a poll were taken how many lawyers would prove themselves "allergic" to these things? And yet the lawyer who has fairly learned the Art of Living may be said to have acquired a true philosophy of life. He can look back, at threescore-and-ten, at a well-spent life; and at any intervening period of his working years he can balance the Book of Life and show a profit. If he were to moralize, he could say with truth, at any time in life—

I may not have been a great success, but I have never been a failure. If I have stumbled, I have picked myself up again. I have accepted with gratitude the faculties of body and mind which nature gave me. I have used, again with gratitude, the education and environment which were provided for me. When I am through I hope I can say that I have added, at least a little, to the great spiritual endowment of mankind.

The truth is, unfortunately, that too many fine lawyers, for one reason or another, waste or dissipate much of their spiritual resources and intellectual vitality, when their entire life-span is considered. Bacon (who was a very great lawyer as well as a philosopher) speaks of "the morbific humors of the mind," which he implies, are peculiarly the disease of those who labor among books. Even the greatest and noblest minds have suffered from this mental blindness which grows out of a too-great absorption in the task of earning our daily bread. And in nearly every case the thing might have been avoided. John Stuart Mill is a good example. His famous *Autobiography* has a chapter called "A Crisis in My Mental History" which might well be studied by all young lawyers. For more than two years Mill struggled with a severe nervous depression which dissipated his energies and almost destroyed him. But he came out of it with a richer nature and a new philosophy of life. He says:

"For the first time I gave its proper place, among the prime necessities of human well-being, to the internal culture of the individual. I learned by experience that the passive susceptibilities need to be cultivated as well as the more active capacities, and require to be nourished and enriched. The maintainance of a due balance among the faculties seemed to me of primary importance. The cultivation of the feelings became one of the cardinal points in my ethical and philosophical creed."

It is said of the noted clergyman, Theodore Parker:

"He was loaded with erudition. But he exclaimed on his premature deathbed: 'Oh, that I had known the Art of Living; or had found some book or some man to tell me how to live; how to study; how to take exercise.'"

Samuel Butler in his immortal novel, *The Way of All Flesh*, has told us the reason for mankind's failures in these respects. He says:

"All our life long, every day and every hour, we are engaged in the process of accommodating our changed and unchanged selves to changed and unchanged surroundings; living in fact is nothing else than this process of accommodation. When we fail in it a little, we are stupid; when we fail flagrantly, we are mad. In quiet uneventful lives, the changes, external and internal, are so small that there is little or no strain in the process of fusion and accommodation; in other lives there is great strain, but great fusing and accommodating power; in others still, great strain with little accommodating power. A life will be successful or not as the power of accommodation is equal to, *or unequal to*, the strain of fusing and adjusting internal and external changes."

Here we have, in a single paragraph, the concepts and the philosophy of modern mental hygiene.

We lawyers have an example of the powerful influence of the Art of Living in the late James C. Carter (1827-1905) who was, for a generation before his death, the recognized leader of the American Bar. At the age of 50 he suffered a complete nervous collapse from overstrain in his profession, and withdrew totally from the practice for some years. But at the end of that period, because of the lessons he had learned in the Art of Living, he returned to win the highest laurels for a period of nearly a generation. Carter's breakdown, which occurred at the close of his work in the prosecution of the great Tweed-Ring cases, has been described in these words:

"He paid a bitter penalty for those splendid achievements; the burden proved too much for even his catastrophe. With utter disregard of the commonest laws of health, even for the universal rule that the only cure for fatigue is rest, so that the wonder was mere flesh and blood could stand it as long as they did. . . He collapsed on the spot. . . For a period of nearly three years he appeared no more at the Bar or in New York.

"But his splendid constitution contained special reserves of strength and such living springs of vigor, that after those years of complete retirement he came once more upon the scene fully armed and equipped and ready for new contests. In truth, his long period of repose seemed to have renewed and invigorated all his powers. His vigor seemed rather to increase with his years and he was more than adequate to all the demands upon him."

Carter's experience is a sort of magnified version of something that happens in the lives of many active lawyers. Those who are the "quiet, uneventful type," to use Samuel Butler's language, do not break under the strain; although they frequently pay, throughout their lives, with reduced imaginative powers and reduced achievement. But the lawyers of tense and vivid natures must beware; everyone knows how they sometimes suffer the severest penalties.

The life-curve of the lawyer from childhood to senectitude should represent a gradual and balanced arc of three segments. The first third is the period of youth and preparation; the second third is the period of high achievement and struggle; the final third is the period when rewards come and reflection leads to wisdom. Lawyers, almost more than any other profession, spend their lives poring over books. Without some antidote made up of outside interests—something "of the earth earthy," something to preserve the vital equilibrium—the lawyer's life is likely to be warped and stunted. There is a dry and desiccating influence that comes from excessive academic work. And for all people who do that work, including lawyers, the study of the Art of Living should be a constant effort.

U. A. I.

ADMINISTRATIVE OFFICE FOR FEDERAL COURTS*

By Henry P. Chandler
Director, Administrative Office of the United States Courts

General Comment

THE Administrative Office of the United States Courts has now been in operation something over seven months. The energies of the office in this initial period have naturally been devoted in the main to the selection of a staff and the establishment of routine procedures. The staff is now nearly completed. Something over seventy persons have been appointed and only a few positions, all but one or two being of a clerical nature, remain to be filled. One by one most of the services to the courts formerly rendered by the Department of Justice have been taken over.

The Administrative Division of the Attorney General's office previously attended to the business affairs of the courts for the Department of Justice. The law creating the Administrative Office provided that it should take effect ninety days after its approval, that is, on November 6, 1939, and from that time the Administrative Office has been responsible in law for the performance of all the duties laid upon it by the Act. There was no break in the continuity of the service. I cannot thank the Attorney General and his department too highly for making the transition so smooth and pleasant.

It is not necessary to restate the provisions of the act creating the Administrative Office and the general nature of its duties. I propose rather to discuss some of the concrete matters affecting the courts in which the office is at present engaged. Broadly speaking, the Administrative Office has two objectives: first, to provide the courts with their material needs; and second, to serve as a means of information to the courts concerning the state of the judicial business and ways and means of improving the handling of it. Under the first function it is the business of the office to see that the courts have adequate and suitable quarters, supplies and equipment including law libraries, stenographic and professional assistants and an adequate number of judges.

Judge's Libraries

It is sound economy to provide a judge with favorable conditions for efficiency. He is a highly skilled workman, a master craftsman in the law, whose time is too valuable not to be employed to the best advantage. He should be free, as far as possible, to devote his abilities to those parts of the judicial task which only a judge can perform. It is wasteful to compel him to spend time on work which a clerk could do or to deprive him of reasonably necessary law books which are the tools of his profession. In this connection the Administrative Office is giving very earnest consideration to the matters of law books and law clerks for judges.

There is a great variety in the extent and nature of the present library facilities. The Administrative Office plans this summer to make a survey of these facilities on the basis of inventories of the law libraries which are available from the Department of Justice. In advance of a detailed survey I know that wide discrepancies exist. Some judges who have forcefully pressed their requests have fared better than others who have been more reticent, and the libraries of these judges and their successors are consequently unequal.

A general standard for new libraries has been evolved by the Department of Justice in recent years and is being tentatively followed by this office. For a district judge it includes the Federal Statutes, both the United States Code and the Annotated Statutes, a complete set of the reports of the Supreme Court and the Federal Reporter and Federal Supplement, the statutes and reports of the state in which the district is located, digests of both the federal and state reports and citator services, one current cyclopedia of law, such as American Jurisprudence with Ruling Case Law, or Corpus Juris Secundum with Corpus Juris, the restatements of the law by the American Law Institute, and a few text-books in fields of particular importance, such as Bankruptcy, Constitutional Law, Corporations, Federal Income Taxation and the like. The standard library of a circuit judge includes, in addition to the books indicated for a district judge, the statutes and reports of courts of last resort (except in some instances very early reports now out of print) of all the states included in the circuit, with digests of the reports of such states. The cost of such a library for a district judge approximates $3,500 and for a circuit judge $4,500.

Insofar as present appropriations for library facilities are inadequate we shall endeavor to convince the Congress of the economy of furnishing judges with sufficient tools. The process of building up a uniform and adequate system of law libraries for the courts will take time as you will realize, and meanwhile I will ask your forbearance and cooperation.

Law Clerks for Judges

Library books are a form of impersonal aid to the courts. Requisite personal assistance is even more important. One type of such assistance is the service of law clerks. For some years law clerks have been furnished to circuit judges but not to district judges. The appropriation act for the courts for the fiscal year 1941 provides that two law clerks to district judges may be appointed upon a certificate of necessity by the senior circuit judge of the circuit. I should like to discuss the possibilities of help to the courts that lie in this provision.

Some may think that a law clerk would be of no use to a district judge and some personally may not desire one. A number of excellent judges have expressed this opinion. On the other hand many district judges, particularly those holding court in the more congested districts such as New York, Washington, and Baltimore, have deplored the lack of this kind of help. I know district judges who are employing law clerks and paying them out of their own salaries rather than go without them. I think most modern lawyers who have grown up under the conditions of practice in large cities take it as a matter of course that a man can practice law more efficiently with the aid of a law clerk. The clerk can do many things in the way of finding and running down decisions, briefing questions of law, digesting testimony and the like that permit the lawyer to apply his time to much better effect than if he had to do all this detailed work himself. I am informed that a good

*Excerpts from address given before the Judicial Conference of the Fourth Circuit at Asheville, N. C., June 21, 1940.

many trial judges likewise think that a law clerk can be of great aid.

Of course decisions involving the exercise of judicial discretion only the judge can make, but I can see no reason why the judge should not be helped by a clerk in assembling the materials for his judgment, whether these be the decisions of other courts upon a point of law, preparation of topical digests of extensive records or other work that will come to your minds. In any event a law clerk is a means of reenforcing the judge which I submit we should try to the extent that the provision in the appropriation for 1941 permits. If it is only an experiment, we should try at least to see whether there be any good in it.

Business Side of Office

I turn now to the second function of the Administrative Office, which is to inform the courts from time to time of the state of their business and to help them devise ways and means of handling it with more and more efficiency. The basis of knowledge concerning the business of the courts is the judicial statistics to be published annually in the reports of the Administrative Office and furnished quarterly to the senior circuit judges in regard to their respective circuits. I realize the limitations in statistics. They often do not show material facts that lie behind the figures and elude statistical portrayal. Nevertheless, imperfect as statistics are, we have to look to them for some of the facts that we need to know in reference to the business of the courts, such as the number of cases that the courts are handling and the gain or loss in the relation between cases disposed of and cases brought in any given period. I can assure you that the Administrative Office will give continuous attention to the form of the judicial statistics with a view to making them reflect as accurately as possible the actual conditions. We begin with the statistics in the form in which they have been developed by the Department of Justice. This form is the result of careful thought and some experience, and will not be lightly changed, first, because changes should not be made unless they are clearly for the better; second, because uniformity in statistics is desirable for purposes of comparison.

It is indicated, however, that differentiation should be made, not only in criminal cases but in civil cases, between cases which are delayed in decision because of inability of the court to get to them and cases which are postponed for other reasons such as failure to apprehend the defendants or incarceration of the defendants on other charges in criminal cases, and waiting for the determination of some controlling question of law by another court or active negotiations of the parties for settlement in civil cases, in which neither side desires trial. Mr. Shafroth, Chief of the Division of Procedural Studies and Statistics, is at the present time considering how these elements can best be reflected in the judicial statistics.

Visitation of Courts

After everything possible is done to make the statistics a true index of conditions, much that is necessary for an understanding of the work of the courts will remain to be ascertained by observation on the ground and face to face conversation with the judges, clerks, United States attorneys, referees in bankruptcy, commissioners and others who can supply a human interpretation. For this purpose Mr. Shafroth devotes a considerable part of his time to traveling about the country visiting the courts. During the coming fiscal year he will have, I hope, two competent assistants in this work. I desire to acknowledge the courtesy and help which have been given uniformly by judges and other officers of the court to Mr. Shafroth on his visits thus far and to bespeak the same kindly assistance for him and other members of the staff in the future. We shall come to you, when we do come, not as critics but as friends, to learn from you about your problems, and to help you in solving them in so far as they are of an administrative nature.

It is too early to predict what the trend in the judicial statistics to be published in the first annual report of the Administrative Office will be, but I hope and believe that generally it will show that the federal courts are keeping abreast of their work. The society in which we are living expects and requires that judgments shall be not only sound but reasonably prompt. Our objective must be so to equip and man the courts that without undue strain they can decide the controversies that come before them soundly and at the same time promptly.

Probation

Probation is apart from the other activities of the office and I might well have hesitated to take charge of it, if it had been mine to choose. But the Judicial Conference decided, necessarily it seems to me, that the Administrative Office had no option in the matter; that under the terms of the act creating the office, the general oversight of the probation officers was committed to it along with all other administrative matters relating to the administrative personnel of the courts. Now that it is settled that the general supervision of federal probation falls to the Administrative Office and through the office to the courts themselves, it is well for us to recognize the responsibility that goes with it. The judges now, in part through their direct control of the probation officers of their courts, and in part through the direction of their own agency, the Administrative Office, have complete charge of federal probation. It is for us, the judges and the Administrative Office working together, to prove that the change will be for the best: not only that there will be no lowering of standards as some profess to fear, but even an improvement of the quality of the service to which the Bureau of Prisons has made so valuable a contribution.

I am myself a sincere believer in probation for large numbers of offenders of the milder types. The criterion is the protection of society rather than the individual interest of the offender if the two conflict. But I am convinced that in cases in which probation by reasonable standards is applicable, society is better protected in the long run by probation than by commitment to prison. I will not labor the grounds of this belief which are familiar to all of you. But I can sum them up shortly. Except for the most serious offenses, everybody who goes into prison comes out. If he comes out with criminal tendencies only grooved more deeply by association with criminals, with bitterness in his heart, as many do, he is likely to be a greater danger to society than when he went in. The essence of probation is the correction of criminal tendencies by bringing to bear wholesome personal influences, those of the judge, the probation officer, and other agencies whose aid they can enlist, under the conditions of a normal environment. When successful (and the proportion of success is relatively high) probation is the best protection of society because it works

upon the spirit and changes the inner motives of the offender. No longer is his hand against every man and every man's hand against him, but he is fitted into the society to which he belongs.

The appointment of probation officers is vested in the judges and logically so vested. The relation between the probation officer and the judge is one of intimate confidence, and the judge may well desire to know from personal acquaintance of the reliability of the probation officer in his court. My appeal is that in individual cases the selection of probation officers be made with recognition of the importance of adequate education and training for what is a specialized educational task, and above all of character on the part of the probation officer that gives sanction to his counsels of right living. I also hope that the judges collectively on appropriate occasions will voice their approval of reasonable standards. The ends of probation, in my judgment, can be attained only with probation officers of high qualifications.

Conclusion

I have thus endeavored to put before you some of my hopes which I know are yours for improving the judicial administration. I count it a privilege to work with you. I gratefully acknowledge the consideration which Judge Parker and all of you with whom I have had contacts have shown me. I pledge you in return for myself and for my associates of the Administrative Office, our best efforts to serve you and to make your path of duty easier.

In a world torn by hate and strife, a large part prostrate under brutal force, there is still, we must believe, such a thing as justice, calm, benignant, reassuring. However dark the day, let us not lose hope that in God's good time it shall regain its sway among men. As we go about our tasks in the federal temple of justice, tasks that now sometimes seem so far from actuality, let us have faith that we are helping to keep alive the sacred flame of freedom against the better day that shall surely come.

THE LEGAL CAREERS AND INFLUENCE OF HENRY AND SIR JOHN FIELDING*

AN OBJECT LESSON IN THE IMPORTANCE OF THE LOWER COURTS

BY FRANK W. GRINNELL
of the Boston Bar

WE are coming to realize on both sides of the Atlantic that the lower tribunals, commonly referred to as "inferior" courts, are "inferior" only in a technical sense, and that, in their actual influence and position, they represent the administration of justice to more people than any other tribunals. The reason is that they come in direct contact with, and are watched closely by, more members of the public as parties, or witnesses, whose respect for law and confidence in the courts is essential to the peace of the community. This fact gives current and continuous significance to the story of the short legal career of Henry Fielding, the author of *Tom Jones*, and of his blind half-brother, who succeeded him as a magistrate for thirty years in the middle of the eighteenth century. Mr. Leslie-Melville, in the latest book about them, has said:

> "There is surely no parallel to the volume of energy which flowed from these young, but terribly infirm, reformers."

Without desiring to exaggerate, I think they gave to the lower criminal courts, to the police, and to the public, an example, and a suggestive force worthy of study by practical men today because it was similar to that which Lord Holt contributed by his influence to the higher English judiciary.[1]

Thackeray, in his essay on the "English Humorists of the Eighteenth Century," said, "I cannot offer or hope to make a hero of Harry Fielding." I regard Fielding as one of the heroes of legal history. Why?

We must first try to get a glimpse of the condition of the lower magistracy, the social conditions, and the police in London about 1750.

The lower magistrates, or justices of the peace, developed from the early "peace wardens" by the gradual addition of judicial functions,[2] but they were still policemen in a very real sense, as will be shown presently in describing the activities of Saunders Welch. Henry Fielding led a raid on a gaming house, and other places, more than once, and both Fieldings were as much commissioners of police for the metropolis as they were magistrates.

Social Conditions and the Increase of Robbers

The period from 1748 to 1756 was one of depression. Henry Fielding, himself, described the London

*A paper read before the Massachusetts Historical Society.

1. In an address by Chief Judge Bond of the Maryland Court of Appeals on, "The Growth of Judicial Ethics," he referred to Sir John Holt, the Lord Chief Justice, who took office after the revolution of 1688 and presided until his death in 1710, as follows:

"Holt was one of those men of originality and initiative who by a sort of reflex seem to have been born to meet particular needs; and, if ever a judge might be called dynamic, he was one of the very foremost of the kind. . . . Lord Campbell said of him, that he was, 'the model on which, in England, the judicial character has been formed.' And Foss, the historian of the judges . . . says, 'In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that . . . exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench.'"—*Mass. Law Q.* May, 1933.

2. The extent to which justices of the peace entered into the government of England in the eighteenth century is described by George M. Trevelyan in, BRITISH HISTORY IN THE NINETEENTH CENTURY FROM 1782 TO 1901.

that he knew in the communication addressed to Lord Chancellor Hardwick in 1751, which is entitled, "An Enquiry into the Late Increase of Robbers, etc." After describing the lodging houses "in the parish of St. Giles" and "in St. George, Bloomsbury," where idle persons and vagabonds lodge "for two pence" a night "with gin available at a penny a quartern," he said:

> "If one considers the destruction of all morality . . . on the one hand, and the excessive poverty and misery . . . on the other, it seems doubtful whether they are more the objects of detestation, or compassion.
>
> "Among the other mischiefs attending this wretched nuisance, the greater increase of thieves must necessarily be one. The wonder is, that we have not more robbers than we have."[3]

The Police or "Watch"

For about 500 years, the police system, or, more accurately, the lack of a police system, continued practically unchanged. The constables, who developed from the "tithing men" with responsibility for the good behavior of the inhabitants of a "tithing," or group of ten houses, had their functions outlined by statute in 1285, which defined the "Watch and Ward" and directed them to watch during the night and arrest suspicious persons. If these persons would not obey the arrest, they were to "levy hue and cry" and follow them until they caught them.

These constables generally were paupers from the work house or old men picked from anywhere,—described by Fielding in his last novel, *Amelia*, as men

> ". . . who, being to guard our streets by night from thieves and robbers, an office which at least requires strength of body, are chosen out of those poor, old, decrepit people, who are, from their want of bodily strength, rendered incapable of getting a livelihood by work. These men, armed only with a pole, which some of them are scarce able to lift, are to secure the persons and houses of his magesty's subjects from the attacks of gangs of young, bold, stout, desperate and well-armed villains."

These men, who carried lanthorns with their poles, were paid, in some districts, only 1 s. 6 d. a night, and, naturally, there was corruption.

> "In fact, the watch was little in advance of that of the days of Dogberry and Verges, and the only thing they could do satisfactorily was indicated in Gay's *Trivia*:
>
> 'Yet there are watchmen, who with friendly light
> Will teach thy reeling steps to tread aright;
> For sixpence will support thy helpless arm
> And home conduct thee, safe from nightly harm.'"

The "Trading Justices"

This brings us to the character of justices when the Fieldings were placed in command, for John Fielding was made a justice in 1751 to assist his brother. While, as Trevelyan says, there were many honest men among them, especially in the country districts, the London justices were, as a rule, considered corrupt, partly because of the fee system of compensation, and were known as "trading justices." Hogarth pictured one hearing a lady of easy virtue "swearing a baby on a grave citizen," and Fielding began to ridicule them as a young man, as early as 1730, in his play entitled, "The Coffee-House Politician: Rape upon Rape, or, The Justice Caught in His Own Trap," a comedy which was acted on the London stage. The prologue to this play (quoted in a footnote)[5] illustrates the serious moral purpose which, even at the age of twenty-three, began to run through all the writing of this genial, witty, convivial, but fundamentally serious, crusader, who was "making law" by the force of ridicule.

The character of Justice Squeezum, in the play, is described by his wife:

> "You say I am extravagant; I say I am not: sure my word will balance yours everywhere but at Hick's Hall.—And hark'ee my dear; if, whenever I ask for a trifle, you object my extravagance to me, I'll be revenged; I'll blow you up, I'll discover all your midnight intrigues, your protecting ill houses, your bribing juries, your snacking fees, your whole train of rogueries."

But Fielding brings in Justice Worthy as a virtuous contrast. Again, in "The Debauchees," in 1733, one character describes his career as a London justice:

> "With the whores of Babylon did I unite; I protected them from justice: gaming houses and bawdy houses did I license, nay, and frequent too; I never punished any vice but poverty."

In "The Author's Farce," written by Fielding in 1730, *Punch* replies to the remonstrance of *Luckless* that without a stock of law, he would starve at the bar, "Yes, but I'll get upon the bench: then I shall soon have law enough; for then I can make anything I say to be law."

The first Bow Street magistrate was Thomas DeVeil, a colonel appointed in 1729 and knighted in 1744. He was active and effective, to some extent, in dealing with gangs of thieves, but he boasted of making £1,000 a year,—more than three times as much as Henry Fielding was willing to make with much more business in the court. Hogarth's realistic print, "Night," is said to show DeVeil in the left foreground being assisted home in an obvious condition.

How did a playwright and his blind brother happen to appear on the bench to take the lead in coping with the London gangs in this state of affairs?

Henry Fielding's Earlier Career

Henry Fielding's father, a lieutenant-general, was apparently a sort of genial spendthrift. His mother was the daughter of Sir Henry Gould, a judge of the King's Bench. Henry was born in 1707. He was sent to Eton, but most of the family funds seem to have

3. THE LIFE AND WORK OF SIR JOHN FIELDING.—R. LESLIE-MELVILLE. (pp. 42-43).

4. HENRY FIELDING, NOVELIST AND MAGISTRATE.—JONES (p. 144).

5. "In ancient Greece, the infant Muse's school,
Where Vice first felt the pen of Ridicule,
With honest freedom and impartial blows
The Muse attack'd each Vice as it arose:
No grandeur could the mighty villain screen
From the just satire of the comic scene:
No titles could the daring poet cool,
Nor save the great right honourable fool.
They spar'd not even the aggressor's name,
And public villany felt public shame.
Long hath this gen'rous method been disus'd,
For Vice hath grown too great to be abus'd: . . . .

"But the heroic Muse who sings to-night,
Through these neglected traits attempts her flight.
Vice, cloth'd with pow'r, she combats with her pen,
And fearless dares the lion in his den.
Then, only reverence to power is due,
When public welfare is its only view:
But when the champions, whom the public arm
For their own good with pow'r, attempt their harm,
He sure must meet the general applause
Who 'gainst those traitors fights the public cause.
And while these scenes the conscious knave displease,
Who feels within the criminal he sees,
The uncorrupt and good must smile, to find
No mark for satire in his generous mind."

Prologue to *The Coffee-House Politician, etc.*

evaporated in litigation or otherwise. He spent much time at his grandmother's house, where he had access to his grandfather's library, and perhaps got his first taste for law among the law books. He began to write and produced his first play in London in January, 1728, when he was about twenty years old. He went to the University of Leyden until the apparent failure of his father to remit funds brought him back to England at the end of 1729 with the problem of earning his living by his wits, or, as he described it, of becoming "a hackney writer or a hackney coachman."

Within the next seven years, he wrote some twenty farces or plays, some of which met with considerable success and established him as one of the most popular playwrights of the day. The law courts were then held in Westminster Hall, close together so that one could wander from one to the other very readily, as is shown by the old prints. Fielding's interest in people doubtless led him to become familiar with the drama of the profession, references to which are frequent throughout his plays and novels, in which he constantly ridicules many of the shams and absurdities then current in the profession, both in and out of court.

Gradually developing as the wittiest Englishman of his day, he turned from merely entertaining plays to political satire and journalism, striking right and left at shams, abuses and corruption, and finally about 1737, as Henley says, "he hit out at Walpole and his government with so quick a fist and so long and vigorous an arm that to protect himself the Prime Minister was reduced to laying the matter before the House of Commons."

Walpole secured the passage of the licensing act, against the opposition of Lord Chesterfield, primarily to drive Fielding from the stage. This was the origin of the licensing act under which, in the opinion of authors, at least, the English stage has suffered ever since. Thus deprived of his means of living, Fielding turned to the law, which had always attracted his interest, and was admitted to the Middle Temple in 1737 at the age of thirty. His turn to the law caused surprise and ridicule, but one anonymous admirer celebrated the occasion in optimistic verse, expressing the hope that Fielding might become a Lord Chancellor.

In the Temple, he associated with Charles Pratt, later Lord Chancellor Camden, and Robert Henley, later Lord Northington, also Lord Chancellor (a three-bottle man), and other wits and convivial spirits. They drank together freely, as was the custom, and laid the foundations of gout, but the suggestions of some writers as to the extent of his bibulous habits seem absurd when his work is considered: for he began, at once, the collection of a considerable law library and studied law so intensively that he was called to the bar within three years, instead of the customary five or six, at a time when the standards of admission were comparatively high. He also earned a little by writing articles. In 1739, with Ralph Allen, he founded "The Champion or British Mercury, to which he contributed in its first seven months at least seventy long essays under the name of *Captain Hercules Vinegar*, lashing about at all the abuses in sight. Called to the bar in 1740, he joined the western circuit. Shortly after, he severed connection with The Champion, but kept on writing Shamela and a stream of stray papers.

While he had a little business, the conservative-minded attorneys, or solicitors, appear to have been shy of a witty playwright turned barrister. Jones attributes this professional prejudice to "the opinion, at that time generally held, that, in Wycherley's words, 'Appollo and Littleton seldom meet in the same brain.'"

But Fielding, as usual, made the best of his opportunities for observing human nature in litigation. He had to support his wife and children, to whom he was devoted. The appearance of Richardson's *Pamela* made a novelist out of Fielding in 1742 by stirring his whimsical, robust spirit to react by writing *Joseph Andrews* with Parson Adams as an English *Don Quixote*. This appears to have been written in about four months while his wife and a child were ill. The child died and it almost broke his heart. *Joseph Andrews* ran through three London editions of 1,500 copies each in thirteen months and was translated into French. He then fell back to miscellaneous writings and plays which were acted by Garrick, Peg Woffington, Kitty Clive and others. At this time, while only in his thirty-sixth year, his strong constitution showed signs of breaking. Governor Cross says:

> "Gout, which was eventually to cripple him, laid him up for the winter. High living may have had something to do with this; but Fielding was rather paying the penalty for incessant labour since he gave up the theatre. As a barrister and editor, he had been doing the work of two or three men."

Fielding's Appointment to the Bow Street Bench

Gout steadily interfered with his practice, but he kept on writing. Although he appears to have had an ambition to end his career, like his Grandfather Gould, as a justice of the Kings Bench, his health was such that in 1748 he realized that he could not rise in the profession. Consequently, he accepted the position of justice of the peace for Westminster,—obtained for him by his friend, the Duke of Bedford, on the suggestion of Lord Lyttleton, who was at Eton with Fielding and a life-long friend. Shortly afterward, he was made the principal justice of the peace for Westminster at the Quarter Sessions at Hicks Hall (popularly known as "Hell"), and, almost at the same time that he accepted this command in the war against crime in London, *Tom Jones* which had been in preparation for about three years, took the London world by storm. As Sir Walter Scott said, Henry Fielding had become "the father of the English novel."

Saunders Welch—the First Modern Policeman

Next to his brother John, Fielding's right-hand man was Saunders Welch. He was born in 1711 and was three years younger than Henry, and eleven years older than John. The son of paupers, he was educated in the workhouse, apprenticed to a trunk-maker, then became a grocer, and, gradually, a man of sufficient substance to be elected high constable of Holborn about 1747,—the year before Henry became magistrate for Westminster.[6]

He was made a justice in 1755, on the recommendation of Henry Fielding. As a sample of his police activities, it appears that he learned that a notorious offender, who had eluded several of his men, was in a "first-floor" or, as we would say, "second-story" room in a certain house. At that time the streets were paved with pebble stones close to the house doors:

> "After hiring the tallest hackney-coach he could select, he mounted the box with the coachman, and when close against the house, ascended the roof of the coach, threw up the sash of a window, entered the room, and dragged the fellow from his bed out at the window by his hair,

6. A vivid description of Saunders Welch appears in the first volume of JOHN T. ("RAINY DAY") SMITH'S NOLLEKENS AND HIS TIMES. Nollekens, the sculptor, married Welch's daughter.

naked as he was, upon the roof of the coach; and in that way carried the terror of the green lanes down New-street, and up St. Martin's-lane, amidst the huzzas of an immense throng which followed him to Litchfield-street."

Henry Fielding as a Magistrate

The most lucrative form of graft was the encouragement of arrests, often of innocent persons, for the sake of the bail fees.

"James Townsend, a Bow Street runner . . . explained how lucrative this practice used to be, 'and taking up a hundred girls, that would make at two shillings and four pence, £11, 13s, 4d.' They sent none to gaol, for the bailing them was so much better.'"

Fielding stopped this business at once in his court and set an example of an incorruptible judge. He even waived his fees in the case of poor unfortunates, as he was always generous. This example of judicial "good behavior" was continued after his death for thirty years by his brother. Fielding in his own words—

"reduced an income of about £500 a year of the dirtiest money upon the earth, to little more than £300; a considerable proportion of which remained with my clerk; and indeed if the whole had done so, as it ought, he would be but ill paid for sitting almost sixteen hours in the twenty-four, in the most unwholesome, as well as nauseous air in the universe, and which hath in his case corrupted a good constitution without contaminating his morals."

Continuing his picture in his *Voyage to Lisbon*, when he was dying in 1854, he said:

". . . I received . . . a yearly pension out of the public service money; which I believe would have been larger, had my patron been convinced of an error, which I have heard him utter. . . . That he could not indeed say, that the acting as a principal justice of peace in Westminster was very desirable, but that all the world knew it was a very lucrative office. Now to have shown him plainly, that a man must be a rogue to make a very little this way, and that he could not make much by being as great a rogue as he could be, would have required more confidence than I believe he had in me: I therefore resigned the office, and the farther execution of my plan to my brother, who had long been my assistant."

This was the popular opinion of a justice of the peace, in the latter half of the eighteenth century, which the Fieldings managed slowly to reverse:

"Obviously," says Leslie-Melville, "we may now say, it was too much to expect men properly qualified by birth and education to undertake the difficult and responsible task of administering justice in a crime-ridden metropolis simply for love of the public, and it was John Fielding who showed that corruption would not be stamped out *until metropolitan justices were placed on a stipendiary basis*. Like Henry, he received a pension from the government, but it was not until 1792, twelve years after his death, that his recommendations in this respect were adopted."

Thus the plan for modern salaried magistrates was the second influence of the Fieldings.

While Fielding's compensation from fees, above the amount he paid his clerk, approached the vanishing point, the real business of his court increased because he was honest. He visited the prisons and informed himself thoroughly as to everything relating to his office. For the next few years, his vigorous administration astonished the "gentlemen of the press."

In 1849, he delivered a charge to the grand jury which was printed and attracted wide attention. He warned of the danger of gangster control in London and, within two days, a riot occurred, a prison was broken open, houses were entered and burned, and the troops called out. Fielding saw the need of an effective police force and gathered six courageous men under the lead of Saunders Welch—the first detective force in England. The story was not made public until after his death, as secrecy of men and methods was demanded by efficiency, but, in 1851, the government, against Fielding's judgment, offered rewards of £100 to thief takers. This led to professional informers who induced men to steal, generally after getting them drunk, and then informed and convicted them for the reward. One young man was hanged as a result. The most notorious informers, McDaniel and his gang, were captured and convicted in 1855, and the charge was made that they were some of Fielding's men. Then Sir John denied this and told the story in two or three pamphlets and a letter to the Duke of Newcastle.[8] Fielding's men served for one year, but were so well treated by the Fieldings that many of them volunteered for further service and gradually a considerable force of determined men were on call. Anyone committing an act of cruelty or injustice was discharged. They gained special knowledge of places and persons of ill repute. As stated by Lee, in his *History of Police in England*, it was the first time "that any intelligence was brought to bear on the problem of the police." By 1753, when there was an epidemic of violent robbery and murder, the force first received vague recognition in the King's Speech. The government was alarmed.

Fielding, as he tells us in his *Voyage to Lisbon*, was "almost fatigued to death" with several long examinations relating to five different murders, all committed within one week by different gangs of street robbers. He was very weak and had been ordered to Bath for a complete rest, when he was summoned by the Duke of Newcastle to submit a plan to stop the gangs. He was offered £600 by the Privy Council with which to get the men, and, in spite of his health, he got them, spent days and nights examining those arrested, and, within a few days, in his words, "the whole gang of cut-throats was entirely dispersed, seven in actual custody and the rest driven to some other town and others out of the kingdom."

Meanwhile Fielding published his last novel, *Amelia*, a forerunner of the reforming novels of Dickens, Charles Reade and others, in the nineteenth century—in other words, part of the "making of law" by novels written to awaken the public conscience. His whole life, from the time he was appointed justice, was devoted, in spite of ill health, to the protection of the public. In 1852, he founded his fourth newspaper, The Covent Garden Journal, as an organ of information and suggestion. He attacked the gin-soaked condition of London and the ineffective license laws and his writing was published almost simultaneously with the appearance of the terrible print—"Gin Lane"—by his friend Hogarth. He sent drafts of legislation, and his well-known "Inquiry Into the Cause of Robberies," to Lord Chancellor Hardwicke, and some of his ideas appear to have come through in legislation, *although other people got the credit*. He attacked the gaming houses, the poor laws, the pawn-brokers' "fences" and receivers and the lax laws about them; he was the first to recommend the abolition of public executions known as the "Tyburn Holiday"; he attacked the condition of prisons for debtors and others and helped to pave the way for

7. A HISTORY OF POLICE IN ENGLAND.—W. L. MELVILLE LEE (p. 170).

8. Copies are in the Boston Athenaeum.

Howard, Romilly and other prison reformers at the end of the century. He ridiculed the cost of private litigation, the legal delays, the absurdities of procedure and practice, the "Dodson and Foggs" and "Quirk, Gammons & Snaps" of his day, but always by contrast with something better, for his was a constructive mind and spirit and he was not merely a destructive critic.

In 1754, at the age of forty-seven, ill with gout and dropsy, he gave up his office and sailed for Lisbon, where he died, still cheerful, gallant, generous and entertaining to the end. One reviewer has described him as "a dying man who enjoys every moment that can still be enjoyed, forgives everything that can be forgiven, laughs at everything that can be laughed at and bears with equanimity what is almost unbearable."

He left his brother John to carry on his great work for thirty years, and, as Leslie-Melville says, "to originate much, which, perhaps, the brilliant, but less methodical, Henry would not have conceived."

Sir John Fielding

General Fielding, the father, married his second wife in 1719, and in the next eight years, as Henley says, was begetting children "with all the lustiness of a British soldier." Six were born, and then his wife died, and he married two more wives. The only child of the second marriage who survived youth was John. Little is known of his life until 1749, when he was twenty-seven years old, as all the papers of both brothers were destroyed in the Gordon riots of 1780 when the mob attacked the "Public Office" at Bow Street. By some accident he was blinded. The only direct reference which he made to this misfortune was in the preface to some essays, in 1763, when he wrote: "an accident, which everyone but myself deemed a misfortune, forced me into retirement at the age of nineteen . . . The rational delights of reflection, contemplation and conversation, soon made me insensible of any loss I had suffered from the want of sight." His ears were his eyes, and as a magistrate he could recognize most of the habitual rogues in London by their voices alone.

The outline of his career and of his posthumous reputation appears in a striking manner in the preface to Leslie-Melville's book. He says, "Sir John Fielding has been even worse treated" than his brother. The account of his life by Sir Leslie Stephen in the *Dictionary of National Biography* "leaves much to be desired on the score of accuracy and adequacy."

> "Sir John Fielding claims our attention" as a great Englishman, "not merely because he was one of the best-known and most picturesque Londoners of the latter half of the eighteenth century; the 'Blind Beak' whose court in Bow Street was thronged with visitors of every class, literally from dukes to dustmen, sharing the curious spectacle, which would be no less curious today, of a blind man unravelling the darkest secrets. His right to our recognition strikes far deeper than this, for no one has played a greater part than he in moulding London to the form we now know."

Besides giving London justice, and carrying out Henry's idea by persuading the government to provide the salaried magistracy, he "made the Englishman accept the idea of a paid police force. . . . From this organization has descended in direct line the Criminal Record Office, the mainspring of Scotland Yard. Sir John Fielding, in short, laid down the basic principles of crime detection, which may be summed up in his own five words: 'Quick notice and sudden pursuit.' . . ."

He was also a pioneer in our modern problem of juvenile crime. "It is certain," he said, when dealing leniently with boys charged with stealing, "that sending such boys into prison is much more likely to corrupt than reform their morals." Believing that "prevention, and not punishment, was the first principle of police," he organized two charities for deserted boys and girls of London. These two charities, and a third with which he was closely connected, are still doing important work—the Marine Society, the Royal Female Orphanage, and the Magdalen Hospital.

The striking thing about the contributions of Sir John Fielding was their simplicity, which is worth studying today from the point of view of the public weal.

He noticed first that the civil power in the city was separated, and, therefore, weakened (still true to some extent in American cities today); and, second, that the turnpikes were not sufficiently guarded to prevent escape. To meet the first weakness, he proposed the appointment of five or six magistrates with fixed salaries and separate offices distributed in different parts of the town with a principal office in Covent Garden so that a justice would be in constant attendance and ready to act on any information; that each of these offices should keep separate registers of their information and send copies to the central office, where they should be kept in a general register for quick reference. This central register was one of the fundamental ideas which grew into Scotland Yard.

He also proposed that all the fees of the justices should be pooled, not for them, but for various expenses connected with their offices, clerk hire, messenger-service, etc.; that they attend on the first day of every term of the King's Bench to receive a charge from the Lord Chief Justice, and that they have monthly meetings at the central office for conference and discussion of their common problems. This resembles the regional conferences of the Administrative Committee of the District Courts in Massachusetts, and recent federal circuit conferences, and suggests the needs of large cities. He also suggested the establishment of a court paper by law for advertising everything relating to the discovery of offenders, etc. He established one himself, and finally—he recommended, persistently, the improvement and extension of the lighting of streets and particularly that lamps be not fixed on the side of houses but on the outside of the footway, thus encouraging, with repeated emphasis, the use of the product of the Nantucket whalers.[9] To close the avenues of escape, he proposed a sufficient horse patrol on all the London turnpikes with a plan for prompt information to the central office and that sheds be built on the turnpikes for the shelter of men and horses in bad weather.

These ideas seem to us so simple today that it may be difficult to throw ourselves back to the time when it was nobody's business because it was everybody's business, to think of these things, until a curious combination of circumstances placed two educated, broad-minded

9. An article in the NEW ENGLAND QUARTERLY for June, 1935, by Mr. Gerald S. Graham, entitled, *The Migration of the Nantucket Whale Fishery*, begins as follows:

"In the first volume of his *History of England in the Eighteenth Century*, Lecky has given a vivid description of the dangers and terrors that beset the streets of London after dark. . . . In 1736, came a momentous forward step—the introduction of systematized street-lighting. Up to that time, London was probably the worst-lighted large city in Europe. . .

"By 1780, there were more lamps in Oxford Road, alone, than in the entire city of Paris. . . . Few measures enacted during the eighteenth century contributed more to the safety of the metropolis than that which was passed in 1736. Up to the organization of the Peelite police force, in 1829, perhaps, the greatest contributor to public safety in the realm was the sperm-whale."

But the active thinking contributors were the Fielding brothers.

men with vision on the police bench, who, not only thought of them, but had the courage and determination to carry their ideas into action regardless of consequences to themselves.

The Estimate of Henry Fielding by Governor Cross

We will return for a moment to Henry, in the closing paragraphs of the three volumes of Governor Cross:

"It has seemed to many a violent transition from the man who wrote *Tom Thumb* to this ardent reformer—indeed as if there were two personalities called Henry Fielding. The differences between the Fielding of 1730 and the Fielding of 1750 are, however, more apparent than real. His development under the stress of changing circumstance was perfectly natural and logical, like the development of a great character in a great novel. He had a mind most responsive to his immediate surroundings; and therein lay the prime element of his genius. Seeing things as they were, he always liked so to represent them; he liked to preach and moralize as well." On the bench, "Just as had happened when he was playwright, novelist, and political writer, he reflected completely the new environment. From his court, from his pen, came the information on which were framed laws for the decrease of crime. To this end he laboured day and night, sacrificing his health and finally his life.

"By an inevitable process the wit and humorist passed into the moralist and reformer. The permanent loss to literature was immense; but the immediate gain to society was immense also. At the same time his last post brought out all the finest qualities of Henry Fielding's nature and touched the close of his career with quiet heroism."

The Place of the Fielding Brothers in the Legal "Hall of Fame"

This story has led us to men and events, below the conventional dignity of legal history,[10] but to living forces in the structure of the Temple of Justice. Not far below the head of the list of 18th century builders of the modern "temple" in England—with the names of Holt, Talbot, Hardwick, Mansfield, in high places—with John Howard in the prisons, Blackstone in his *Commentaries*, Romilly in Parliament, and Erskine at the bar—belong the names of Henry and John Fielding, who, seventy-five years ahead of their generation, made law in action out of a moral chaos and set a modern standard of character and progress in a London police court, by honest, firm, intelligent, humane and far-sighted administration and suggestion in the face of rancorous abuse.

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10. Francis Parkman is quoted, by his biographer, as saying, "Damn the dignity of history!"

Bar of Canada to be Represented

THE following item appeared as an editorial in the August 12 issue of the Ottawa Journal. It bespeaks the satisfaction of the Canadian people in being asked to be represented at the convention of the American Bar Association.

"Mr. L. W. Brockington K. C., is to represent the Bar of Canada at the annual meeting of the American Bar Association in Philadelphia in September.

Mr. Brockington's selection for this high honor would be fitting at any time. It is both fitting and of vast importance at this time; a time when it is vital that we of the British Empire speak to our democratic brothers in the United States with all the power and understanding of our common heritage of liberty.

That power and understanding Mr. Brockington possesses to an almost unrivaled degree. His is the gift of pure eloquence; but his also is the greater gift of the understanding of liberty; of the hearts that beat beneath the uniforms of the men who throughout a darkened world stand on guard for freedom.

Four years ago, in Boston, Mr. Brockington spoke to the American Bar Association with an eloquence that was memorable. He will speak to it this time in a new and changed world, and no one who has ever heard him can but believe that his message this time will be equally memorable, and perhaps far more vital

Canadians can look forward to this address with pride; perhaps with a measure of hope and confidence, in its effect."

LEONARD W. BROCKINGTON, K. C.

JUNIOR BAR NOTES

By Joseph Harrison
Secretary of the Junior Bar Conference

IN harmony with the announced theme of the American Bar Association's annual meeting this year the Junior Bar Conference will devote an important part of its program to the present national emergency when it meets at Philadelphia, September 8-11. The Conference has been fortunate in arranging for Hon. Robert H. Patterson, present Assistant Secretary of War and former judge of the Federal Circuit Court of Appeals for the Second Circuit, to deliver the principal address at the opening session of the Conference's meeting on Sunday afternoon, September 8th. Judge Patterson will speak on the subject: "The Part of the Young Lawyer in the National Defense." His address will be broadcast over a coast-to-coast network of the National Broadcasting Company at 3 P. M.

Following the Assistant Secretary of War's speech will be an open forum on "The Part of the Young Lawyer in National Security." Several members of the Conference representative of different parts of the country have been asked to prepare short talks to start the discussion. Thereafter any member in attendance will be given an opportunity to express his or her views. A definite proposal for Conference activity designed to promote the moral and spiritual preparedness of the country is being prepared and will be considered by the Executive Council prior to the general session. H. Graham Morison, New York State Chairman, has been assisted by Conference Chairman Paul F. Hannah and Council Member Charles E. Pledger, Jr., in the preparation of this concrete program. It will be presented to the general meeting of the Conference during the course of the forum.

The State Reports

By the time this issue of the Journal reaches its readers the Advance Program for the annual meeting will have been received by all members of the Junior Bar Conference. It contains the annual reports of the chairman, secretary and national committees of the Conference. These speak for themselves in summarizing the activities and accomplishments during the year past. It is unfortunate, in a way, because it would not be practical, that the reports of the state chairmen cannot be equally publicized. While these are summarized in Chairman Hannah's reports, the full exposition of what has been done in most of the states and the recommendations of the state chairmen would make most interesting reading for all members of the Conference and for all interested in the progress of the organized young bar. These reports have been carefully studied by the Conference's officers and council members and will be passed on to the successors of retiring chairmen. They form the best set of state reports that have been made since the formation of this section. In addition to the old stand-bys, there have been not a few new states in which Conference activity took hold during the year and made substantial progress. Massachusetts, Maryland, North Carolina, Alabama, Arizona, New Mexico, Texas, Kentucky, Oregon, Florida and Colorado form a partial list of the more recent states where the Conference program has been vigorously carried forward.

Meeting of State Chairmen

A special meeting of all state chairmen who attend the Philadelphia meeting will be held at the Bellevue-Stratford Hotel on Sunday morning, September 8, prior to the Conference luncheon. Opportunity will be given here not only for an exchange of views and experiences of state chairmen but also for the pressing of particular recommendations that may be generally agreed upon. The Executive Council will be meeting in an adjoining room and will be able to consider particular proposals of the state chairmen.

A Successful Year

With its annual meeting at Philadelphia, the Junior Bar Conference concludes its sixth and most successful year. The tangible achievements of the Public Information Program evidenced by the increased number of radio scripts and broadcasts and public addresses is again the highlight of the year. The studies of the Committee on Small Litigants in its fields of small cause courts, "loan shark" evils, and legal aid have set the stage for the follow-up work of the committee for next year. Mrs. Mildred G. Bryan, chairman of the Committee on Annotations of the Restatement of the Law has reported that for the first time completed annotations by Conference workers have been turned in. The Membership Committee reported that 1012 new members were recruited through Conference efforts alone and thereby set an all-time high for this type of work. The Committee on Cooperation with Junior Bar groups conducted seven eminently successful regional meetings of the younger bar executives. The Bill of Rights Committee of the Conference carrying out the assignment given to it by the Association's Committee on the Bill of Rights reports that work on comprehensive studies of the Bills of Rights of the 48 states is under way with six of them already completed. The Committee on Relations with Law Students reported substantial progress in contacting senior law students, and newly admitted attorneys. The Committee on Legislative Drafting and Reference Bureaus continued its efforts where possible to promote the adoption of the principle of such bureaus. The Activities Committees made certain that every new member of the Conference was made to feel that he "belongs" and ascertained his preferences of Conference activities. These were in turn properly distributed. This committee also has prepared a well-rounded and timely program of activities for next year.

All in all the Conference's annual accounting shows the fruits of the efforts of several hundred young lawyers. It is a record of achievement. All who contributed to this record may be justly proud.

The Year Ahead

The national crisis will have its effect on the Conference program as it will on the program of every organization of American citizens, irrespective of particular purposes. With its organization in every state, its many experienced workers and leaders, its youth, enthusiasm and ideals, there is every reason to believe that the Junior Bar Conference is destined to measure up to whatever program it adopts or whatever tasks are assigned to it in the great effort to preserve and protect the nation and its institutions.

PHILADELPHA EXECUTIVE COMMITTEE

PHILADELPHIA EXECUTIVE COMMITTEE

Condensed Schedule, Philadelphia Meeting

[Meetings are at Bellevue-Stratford, unless otherwise shown]

MONDAY, SEPTEMBER 9

8:00 A.M. Junior Bar Conference—Breakfast
10:00 A.M. Assembly—First Session: President's Address. Memorials. Offering of Resolutions. Election of Assembly Delegates—*Academy of Music.*
1:00 P.M. Legal Aid, Committee on—Luncheon Meeting.
Patent, Trade-Mark and Copyright Law, Section of—Luncheon Meeting—*Franklin Institute*
2:00 P.M. House of Delegates—First Session: Reports of Officers and Committees. Election of Members of Board of Governors
Insurance Law, Section of—*Manufacturers' Club*
International and Comparative Law, Section of—*Art Club*
Junior Bar Conference
Public Utility Law, Section of—*Ritz-Carlton.*
Real Property, Probate and Trust Law, Section of
4:00 P.M. Junior Bar Conference

TUESDAY, SEPTEMBER 10

9:00 A.M. Patent, Trade-Mark and Copyright Law, Section of—*Franklin Institute*
9:30 A.M. Bar Organization Activities, Section of
Commercial Law, Section of
Insurance Law, Section of—*Manufacturers' Club*
Municipal Law, Section of
Public Utility Law, Section of—*Ritz-Carlton.*
Real Property, Probate and Trust Law, Section of—*Sylvania*
9:45 A.M. Junior Bar Conference
10:00 A.M. Criminal Law, Section of—*Walton*
International and Comparative Law, Section of—*Art Club*
Judicial Administration, Section of
Mineral Law, Section of—*Ritz-Carlton*
Taxation, Section of
11:00 A.M. Insurance Law, Section of—*Manufacturers' Club*
12:30 P.M. Commercial Law, Section of—Luncheon
Municipal Law, Section of—Luncheon
Patent, Trade-Mark and Copyright Law, Section of—Luncheon Meeting—*Franklin Institute*
Taxation, Section of—Luncheon—*Ritz-Carlton*
1:00 P.M. Judicial Administration, Section of—Luncheon Meeting—*Ritz-Carlton*
2:00 P.M. Bar Organization Activities, Section of
Commercial Law, Section of
Insurance Law, Section of—*Manufacturers' Club*
International and Comparative Law, Section of—*Art Club*
Legal Education and Admissions to the Bar, Section of
Mineral Law, Section of—*Ritz-Carlton*
Patent, Trade-Mark and Copyright Law, Section of—*Franklin Institute*
Public Utility Law, Section of—*Ritz-Carlton*
Real Property, Probate and Trust Law, Section of—*Walton Hotel*
Taxation, Section of
2:30 P.M. Criminal Law, Section of
Judicial Administration, Section of
Junior Bar Conference
Municipal Law, Section of
3:30 P.M. Insurance Law, Section of—*Manufacturers' Club*
7:00 P.M. Insurance Law, Section of—Dinner Dance—*Penn Athletic Club*
Junior Bar Conference—Dinner Dance—*Wilson Line Cruise Ship*
Patent, Trade-Mark and Copyright Law, Section of—Dinner—*Aronimink Golf Club*
Real Property, Probate and Trust Law, Section of—Dinner
7:30 P.M. Public Utility Law, Section of—Dinner Dance—*Philadelphia Country Club*

WEDNESDAY, SEPTEMBER 11

9:30 A.M. Assembly—Second Session: Symposium on Federal Regulations of Insurance under sponsorship of Section of Insurance Law—*Academy of Music*
2:00 P.M. House of Delegates—Second Session: Reports of Committees and Sections
Criminal Law, Section of—*Walton*
Insurance Law, Section of—*Manufacturers' Club*
Real Property, Probate and Trust Law, Section of

THURSDAY, SEPTEMBER 12

10:00 A.M. Assembly—Third Session: Ross Bequest Award. Open Forum. Report of Committee on Resolutions, Amendments to Constitution and By-Laws—*Academy of Music*
2:00 P.M. House of Delegates—Third Session: Consideration of Assembly Resolutions. Reports of Committees and Sections
Institute on Adminstrative Law and Procedure—*Union League Club*
7:30 P.M. Annual Dinner

FRIDAY, SEPTEMBER 13

9:00 A.M. House of Delegates—Fourth Session: Reports of Committees and Sections, House Committees and Board of Elections, Election of Officers
9:30 A.M. Institute on Administrative Law and Procedure—*Union League Club*
1:30 P.M. Assembly—Fourth Session: Action upon resolutions adopted by the House of Delegates. Introduction of and remarks by incoming President—*Luncheon at Valley Forge*

CONVENTION SILHOUETTES

What, if anything, may be said that will in a word give the cue to the convention? A few rambling comments may be in order.

Visiting members at annual conventions may roughly be divided into two groups:

First, there are the veterans of past meetings who "know their way about town," and are more or less familiar with the way the machinery of the annual meeting works. This group knows its own members and the hearty reunions which one sees on all sides indicate the close bond that ties them together.

Second, there are the first-time visitors. These, at first generally feel somewhat as Christian and Faithful (from "The Pilgrim's Progress") must have felt as they entered the City of Vanity Fair. But like those redoubtable travelers, the new visitors at meetings, soon fall into a variety of experiences. They are quickly made wiser and (we believe) happier for them. One thing they are sure to recognize —the epidemic of friendliness and good cheer which has caught everybody.

The American Bar Association and its annual meetings are rich in tradition and background; so much so that one feels it in the air. It is only the "Old Guard" who can explain and elucidate these things and give the reasons for "this and that." All things about the Convention, however, have their reasons when they are understood. For example, there is the story of how the annual meetings (and indeed the management of the ABA itself) has passed from what might have been called a "pure Democracy" to the present form of what may be called a "Representative Democracy." It is a story which can not be told here, but it centers around the adoption of the House of Delegates idea about four years ago. That plan of organization of the Association, as well as the scheme of operation of annual meetings, are both still in the development stage. There are, of course, divergent views about these things, as would be expected in an organization of more than 30,000 lawyers. But these divergent views are in general healthy factors rather than otherwise.

All members of the ABA will have received by mail an attractive blue-covered pamphlet, the "Advance Program" of the Philadelphia meeting. It deserves close reading.

Members attending the Convention will also receive a striking and attractive Souvenir Program, which is largely a reproduction of the Advance Program with certain additions. It is the official Hornbook for the Annual Meeting and should be kept constantly at hand.

Of one thing we may be sure. No delegate or visitor at an annual meeting can fail to be touched by the social interests and cultural activities which adorn the sessions. This meeting is particularly rich in these things. Philadelphia is a great and gracious city, full of history and tradition. Every visitor and every delegate will be invigorated and enriched by the culture and stability and beauty of the City of Brotherly Love in the great State of Penn's-Woods.

Incunabula of the ABA

The JOURNAL has in its vault the early records of the first meetings of the ABA. They are interesting and intriguing documents for the lawyer of 1940. At the first meeting at Saratoga Springs, in 1878, there were 73 "registered" members whose names are given; also the names of 100 others who were elected, making a total membership of 173. At the second meeting at Saratoga, in 1879, the membership had grown to 523. It does not appear how many members attended the Convention that year; but there were probably about 100, since "eighty-six members were present" at the annual dinner. Compared to these figures there are now (August 1) 31,511 members of the ABA. It is expected that at least 6,000 will attend the Philadelphia meeting. These figures, more than any words could do, prove the necessity for sensible management and controlled direction of the meeting.

As the authentic "*incunabula*", or early history of our Association, there is set out below the "Call" for the first meeting of the ABA in 1878. It is the acorn from which the present Mighty Oak has grown, and is as follows:

Call for Meeting

Dear Sir:

It is proposed to have an informal meeting at Saratoga, N. Y., on Wednesday morning, August 21, 1878, to consider the feasibility and expediency of establishing an AMERICAN BAR ASSOCIATION. The suggestion came from one of the State Bar Associations, in January last, and the undersigned have been favorably impressed by it. A body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse might be not only a pleasant thing for those taking part in it, but of great service in helping to assimilate the laws of the different States, in extending the benefit of true reforms and in publishing the failure of unsuccessful experiments in legislation.

This circular will be sent to a few members of the Bar in each State,—whom, it is thought such a project might interest.

If possible, we hope you will be present on the day named at Saratoga; but in any event, please communicate your views on the subject of the proposed organization to Simeon E. Baldwin, New Haven, Conn., who will report to the meeting the substance of the responses received.

July 1, 1878.

It seems fitting also to set forth another bit of Res Gestae evidence about the birth of the Association. On page 19 of the Report of the second meeting, in 1879, there is given the following notice of the annual dinner:

Memorandum

The Association gave a dinner to its members at the Grand Union Hotel on the evening of August 21st. Eighty-six members were present. Mr. Latrobe, of Maryland, presided. The following toasts were offered by the Presiding Officer, and responded to by members:

The Legal Profession.....Cortlandt Parker, New Jersey
The Bench.....LaFayette S. Foster, Connecticut
The Retiring President.....James O. Broadhead, Missouri
The New Administration..Benjamin H. Bristow, New York
The American Bar Association.....A. R. Lawton, Georgia
The Nationality of the American Bar Association.....
.....William Preston, Kentucky
The Knowledge of the Titmouse as to the Gestation of the Elephant.....Anthony O. Keasbey, New Jersey
The Canada Bar.....R. F. Hall, Sherbrooke, Canada
The Common Law.....Richard Vaux, Pennsylvania
The Bar as a Conservative Force in Society.....
.....Robert Ould, Virginia
The Practice of the Profession.....
.....Richard T. Merrick, District of Columbia
Woman at the Bar.....Calvin G. Child, Connecticut

ON THE USE OF EXPERTS

By Leon R. Yankwich
United States District Judge, Los Angeles, Calif.

"It is generally agreed that in this country expert testimony is a disgrace to everyone concerned, to the court, to the person who gives it, and to the profession he represents. Not that expert testimony is per se unreliable; it is the system that makes it so. In the first place, there is no scientific basis for the selection of experts and the result is that many of them are grossly incompetent to testify on the issues at stake. Secondly, they are chosen and paid by the litigants, with the inevitable result that each takes a partisan attitude and tries to give his employer his money's worth."

(Lewis M. Terman of Stanford University in address before Los Angeles Bar Association.)

THE field of patent law has become so specialized that the average practitioner has a sense of utter inadequacy when asked to advise with relation to it.

The feeling of one who becomes a United States District Judge, after years spent as a trial judge in a state court, is almost the same. More so, in fact. Because in an inventive country like the United States, even the average practitioner may, just for the sport of it, take the time to familiarize himself with some special problems relating to patent law. However, the judge in the state court has no such opportunity.

In going over the large number of cases I tried while a judge of the Superior Court of California for Los Angeles County, I know of only one case in which a question relating to patent law came before me. And that case related to an accounting under a license, and the right of the licensee to insist that the patentee prosecute infringement, under penalty of refusal to pay royalties. *Bettis v. Patterson*, 1936, 11 Cal. App. (2) 284. So, realizing my inadequacy, I proposed when, in 1935, I was appointed a judge of the United States District Court for this district, to familiarize myself with the topic.

The pragmatic approach to the problem of law, which is a part of the equipment of every American lawyer, stands one in good stead. It enables him to make a quick survey of a field when necessary. One of my colleagues on the Superior Court who practiced in the Philippines, told me how amazed the Spanish lawyers were at the ease with which American lawyers trained to a different system, could find their way about in the Spanish system.

However, rather than rely upon that exclusively and practice law "by ear," as the cases arose, I decided to supplement it by a survey of the whole problem. So, in the field of patents, as in four other fields which were absolutely new to me, I devoted many days to the study of a whole text book from beginning to end. I chose a late one which, while not encyclopedic in character, was extensive enough to cover the whole field.

And I reached the conclusion, which further study of specialized problems since, and the writing of opinions in the field have confirmed, that the principles of patent law are simple. The difficulties of patent practice lie in the fact that the material out of which patent litigation arises is the whole field of human knowledge and the inventive spirit of man. Even in my short experience, the subjects I have dealt with range from highly technical sound production to a simple device for making Spanish tortillas in an improved manner; from shoe manufacturing to hook and gliders for windows; from highly specialized instruments for detecting slant drilling in oil wells, specimen of which produced in court was valued at nearly fifteen thousand dollars, to the humble zipper which, first used in purses and bags, now is attached to garments which cover almost every part of the human body, both masculine and feminine; from highly specialized apparatus for improved lubrication of automobiles to an insecticide for killing insects which afflict the strawberry plant.

In most of these cases the same legal problems arose. On the one hand, invention over the prior art, novelty, usefulness; on the other hand, invalidity for lack of invention or anticipation, buttressed with the usual problem of the doctrine of equivalents, estoppel and the like. So recurrent are these problems that one who, like myself, enjoys writing opinions, must reach the conclusion that he cannot write very many in the field of patent law without constantly repeating himself and using over and over again the same cases or principles. So, while I have written quite a number of opinions, I have done so only when I was in a position to state in each something which was not found in another opinion.

But no such similarity was found in the factual situation presented in the cases. They called for judgment upon the most diverse facts in the fields of knowledge of the widest variety of human experience,—from electricity to mechanics, from shoe making to carpentry, from electro-magnetics to simple mechanics, from highly specialized mechanics to the simple art of mixing edibles with poison. If, to these, I add hair dressing machines, acoustic blocks, lawn sprinklers, sash balances, you will see the variety of domains with which I had to deal.

Of necessity, this, in addition to legal knowledge, calls for information, some of which is of so general a nature as to come within the ordinary range of a judge's knowledge, and other, highly technical. The latter kind of knowledge brings into play the use of the expert.

The technical expert is not new in the realm of law. One of the most interesting defenses of the use of the expert was made by the Persian poet Sadi in his famous poem "The Gulistan." It reads:

> "A man who had a disorder in his eyes, called on a farrier (horse doctor) for a remedy; and he applied to them a medicine commonly used for *his* patients; the man lost his sight, and brought an action for damages. But the judge said 'No action lies, for if the complainant had not himself been an ass, he would never have employed a farrier'."

In the English speaking world, experts as adjuncts to courts have been recognized for many years. In

*Address before Patent Law Association of Los Angeles, June 24, 1940.

1553, in an English case, Mr. Justice Saunders justified the employment of a medical expert in these words:

"If matters arise in our law which concern other sciences, we commonly apply for the aid of that science which is concerned therein, which is an honorable and commendable thing in our law, for thereby it appears that we do not despise all other sciences than our own but we approve them and encourage them as things worthy of commendation."

The expert in the field of patent law has, by the very nature of the law, a broader scope than the expert in other fields. And yet, even in other fields, dissatisfaction with the practice has arisen.

You are all familiar with the vigorous criticism of the medical expert in criminal trials. This is traceable to the fact that physicians can be found to testify on opposite sides of very important questions relating to the existence of disease. Differences of opinion between all experts arise from the same reasons. Not all sciences are exact sciences, and opinions of experts, like physicians, both as to existence of present facts, diagnosis, and in so far as they project themselves into the future, prognosis, may be accountable either by the insufficient development of the science of medicine or by the differences in the factual basis of the opinions. California made it possible to take the odium off the expert in both civil and criminal cases by providing for the appointment of experts by the court to investigate facts and testify. You are familiar with the section. (California Civil Code of Procedure, 1871). It is not limited to medical experts, but covers all matters as to which expert evidence is needed. No other enactment has done so much for the vindication of the expert. Judges use it very freely and satisfactorily.

In a personal injury case, I settled a disagreement between two physicians,—one of whom asserted and the other denied, that the injured person was suffering from traumatic neurosis,—by appointing an internalist who found, and demonstrated with x-rays, that the litigant was suffering from something entirely unconnected with any trauma. In another case, the permanency of an injury to hearing was determined in like manner. In an important criminal case, three internalists whom I appointed to examine a convicted man who was seeking release on bail pending appeal, upon the ground that his stay in jail was injurious to his health, —reached a decision that jail was really an excellent place for his ailment. How the public looked upon the action of these men in giving their sincere opinion may be gathered from the following comment appearing in the Los Angeles Record under date of June 1, 1932. The comment by Dean Richmond (the pseudonym under which Mr. H. B. R. Briggs, the editor of the newspaper at the time, wrote his personal column, Brass Tacks), read:

"It is refreshing to see physicians honestly disagree with their professional brothers, as in the matter of Richfield Wrecker Talbot's plea for bail. Strengthens our faith in the integrity of a profession, the members of which too often cover up each other's blunders, at least by silence."

This comment justifies my belief that the intelligent public does not expect an illusory unanimity of opinion among experts. They respect *honest* disagreement. If they have not respected such disagreements in the past, it is because they were not convinced that they were honest.

The new Federal Rules of Civil Procedure contain a similar provision limited to physical and mental examination. (Rule 35). Its use will prove beneficial. Even before its adoption, by consent of counsel, I have appointed experts to investigate matters for the court and testify as witnesses unbeholden to either side.

But to go back to the expert in patent cases: Two statements will serve as background for comment on his function. The first is from *Singer Co. v. Cramer*, 1903, 192 U. S. 265, 275:

"As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law and susceptible of determination on this writ of error."

The other is from our own Ninth Circuit Court of Appeals and is, so far as I have been able to find, the most accurate yet concise statement of the function of the expert and its limitations. It is from *Overweight Counterbalance Elevator Co. v. Improved Order of Red Men's Hall Assn. of San Francisco*, 9th Cir., 1899, 94 Fed. 155, 160 (Cert. denied 174 U. S. 802):

"In the light of these and other different mechanism, which need not be stated, we are of opinion that, *notwithstanding the general opinions and conclusions expressed by the expert witnesses*, the plaintiff's patent is not infringed by the use of the Frazer elevator.

The court certainly has the unquestioned right to draw its own conclusions from an exhibition and inspection of the respective machines, or models thereof, as well as from the opinions of expert witnesses. It is not bound to accept such testimony as conclusive. *The Conqueror*, 166 U. S. 111, 131, 17 Sup. Ct. 510. It considers the facts upon which the opinions of the witnesses are based, and determines from all the evidence in the case whether the conclusions given by the witnesses are sound and substantial. The value of expert testimony generally depends upon the facts stated as a reason for their opinions and conclusions. *Green v. Terwilliger*, 56 Fed. 384, 394; 1 Tayl. Ev. 58. More weight is given to the testimony of a witness based upon facts within his own knowledge and experience than to the testimony of a witness which is 'largely the assertion of a theory.' *Bene v. Jeantet*, 129 U. S. 683, 9 Sup. Ct. 428. In 3 Rob. Pat. Sec. 1012, the author, in discussing this subject says:

'That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges, and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. . . . . Their statements of fact are simply to be weighed, like those of all other witnesses, by their ability and disposition to disclose the truth; and their opinions are to be followed when, in the judgment of the jury, they are supported by the facts from which they are deducted.' See Walk. Pat. (2d Ed.) No. 400.

The law is now well settled that the trial court not only has the power, but it is its duty, where the evidence is insufficient to support a verdict, in favor of the plaintiff, to instruct the jury to find a verdict in favor of the defendant. This rule applies to patent as well as other cases, and is as applicable to the question of infringement as to any other material or controlling ques-

tion involved in the case. In 3 Rob. Pat. No. 1014, it is said:

"If an inspection of the invention practiced by the defendant, in connection with the one described and claimed in the patent satisfied the court that there has been no infringement, ... there is no occasion for extraneous evidence, and the court should direct the jury to return a verdict for the defendant, without further inquiry. . . . . Neither a court nor a jury are permitted to follow the guidance of any expert, in defiance of the results of practical operation and experiment, nor against conclusions derived by necessary inferences from established facts. Walk. Pat. (2d Ed.) No. 536; *Fond du Lac Co. v. May*, 237 U. S. 395, 402, 11 Sup. Ct. 98; *Railway Co. v. Rowley*, 155 U. S. 621, 630, 15 Sup. Ct. 224; *Black Diamond Coal Min. Co. v. Excelsior Coal Co.* 156 U. S. 611, 618; 15 Sup. Ct. 482; *De Loriea v. Whitney*, 11 C.C.A. 355, 63 Fed. 611, 617; *Cramer v. Fry*, 68 Fed. 201, 212; *Chapman v. Lumber Co.*, 32 C.C.A. 402, 89 Fed. 903, 905; and authorities there cited.'

This principle is recognized in *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, and is not denied in any of the other cases cited and relied upon by plaintiff."

The language is so plain that it need not be epitomized or amplified. I add, however, some additional well established principles.

The construction of the claims of a patent is the exclusive province of the Court.[1]

But, of course, if the construction is not obvious on the face of the patent, the facts produced by the expert witness may influence or, in fact, control such construction.[2]

Reading a claim upon an accused device is not proof of infringement.[3]

It is not my object to turn these informal observations into an elaborate discussion of the expert in patent cases.

Rather, the aim is to express certain general thoughts resulting from practical experience. For that purpose, the general principles just stated and others to be referred to later on will suffice.

To apply them practically, we have to bear in mind the personality of the expert. Who is he? He is either (1) the inventor or the alleged infringer as expert; (2) the patent attorney as expert, and (3) (what I might call without being guilty of Hibernianism) the expert as an expert.

Unless the inventor or the alleged infringer, in addition to possession of inventive genius, which resulted in the invention, is also a real student of the field, his testimony is seldom convincing.

Whether he be the inventor of the patented device or the inventor or manufacturer of the accused device, his testimony is essentially that of an interested party and, in most cases, *he becomes a special pleader*.

I may illustrate this by two cases in which I wrote opinions: *Mantz v. Kersting*, 1939, D. C. Cal. 29 Fed. Sup. 706; and *Joyce v. Solnit*, 1939, D. C. Calif., 29 Fed. Sup. 787.

It is quite evident, as a reading of the opinions will disclose, that in both cases the inventors while on the witness stand claimed for their inventions not only a broader scope than was warranted by the claims, but a scope which was actually rejected in the patent office and as to which an estoppel had arisen. In the one case the claim was that of a duplex flat type of spring sash balance which had been specifically rejected as an aggregation. In the other, it was for wedge-type shoe construction of a character which had also been rejected, and a shoe of particular design substituted.[4]

The situation can be explained psychologically. Their pride of invention, the desire to extend its monopoly, consciously or unconsciously color their testimony so as to make it obvious, despite the claim of counsel to the contrary, that what they were really claiming was a monopoly of a character which was denied to them in the patent office.

So, on the whole, the litigant who offers himself as an expert is not effective, unless, as I said, he is an expert in the particular field and brings before the court factual situations relating to the art and to its history and development,—to enable the court to have a better understanding of the claims in suit. In that event, he becomes, of course, a real expert.

Equally unconvincing is the *patent attorney expert*. He may be trained in the law or he may be scientifically trained. And if he is *not actually engaged* in scientific work, his testimony is, usually, that of a special pleader trying to prove a cause.

Generally, he analyzes the prior art and his effort is confined to an endeavor to convince the court that infringement exists or does not exist through reading the various claims upon the accused or patented structure.

This, of course, means very little, although it is an element which may enter into the determination of infringement.

Apposite to this topic is the following declaration of Judge Matthews in *McRoskey v. Braun Mattress Co.*, 9 Cir., 1939, 107 Fed. (2) 142, 147:

"Appellant cites, as evidence of infringement, the testimony of his expert witness, George J. Henry, to the effect that some of the claims in suit read upon appellee's machine. This, appellant contends, was sufficient to require submission of the case to the jury. The contention is rejected. Infringement is not proved merely by reading a claim upon an accused device. For infringement is not a mere matter of words. *Grant v Koppl*, 9 Cir. 99 F(2) 106, 110. The evidence shows conclusively that, properly construed, the claims in suit were not infringed by appellee. That being so, it is immaterial—if true—that some of the claims read upon appellee's machine."

I do not mean to say that the fact that a claim reads upon a device should always be disregarded. The decisions do not go that far. But both in the light of legal principles and actual experience, their efficacy depends upon the background of knowledge which the expert who analyzes the claims in the patent in suit and in the prior art brings to his task and the reasons he gives for his opinion.

In a recent decision, *Joyce v. Fern Shoe Co.*, D. C. Cal. 1940, 32 Fed. Sup. 401, in disposing of the prior art, I, myself, resorted to this method by reading the claims of the best references both on the patent and on the accused devices.

The dissatisfaction of district judges with interminable analyses of prior art is not new. I am told of an instance where a district judge from another state, who afterwards became one of the judges of the Ninth Circuit Court of Appeals, and who, knowing the habit of

1. Walker on Patents (6th Ed) Secs. 541-542; De Loriea v. Whitney, 1 Cir., 1894, 63 Fed 611, 618; Market St. Cable Ry. Co. v. Rowley, 1895, 155 U. S. 621; Baker v. W. J. Kennedy Dairy Co. 1935, 77 F(2) 574).

2. (Marsh v. Quick Meal Stove Co., 1892, D. C. Mo. 51 Fed 203; Silsby v. Foote, 1852, 14 How. 218, 226).

3. Grant v. Koppl, 9 Cir. 1938, 99 F(2) 106, 110; McRoskey v. Braun Mattress Co., 9 Cir., 1939, 107 F(2) 143, 146.

4. See also: Joyce, Inc. v. Fern Shoe Co., D. C. Cal. 1940, 32 Fed. Sup. 401.

certain patent attorneys in introducing a large amount of prior art, asked him how many prior patents he was going to analyze. When informed that he would analyze some three hundred patents, he stated that he had other more important things to do and would rather read them in the transcript. He instructed the clerk to identify them as exhibits, had a transcript of the testimony made, absented himself from court for three days and thereafter read the analysis in the record. This is an extreme case, of course, although it is an actual occurrence in the Southern District of California, and is attested to by my present clerk.

However, it points to the fact, which is obvious to us all, that, of necessity, in dealing with prior art, the most practical and impressive method is to select the best in that art,—the art which comes nearest to the patent in suit.

To select from the millions of letters patent everything which may relate to the domain of the patent may show the ingenuity of the patent attorney, but it certainly does not give to the court the help which expert testimony should give.

Of course, I am assuming in all this, that we are not confronted with situations where the facts are such that the court from its ordinary experience can form its conclusions or the claims are so obvious they do not require other factual bases supplied by experts.

In reality, however, much of the testimony of the patent attorney is really an attempt, in an indirect way, to supplant the court.

Not permitted to determine that infringement does or does not exist, the attempt is made to achieve the same result by a study of the prior art and a comparison of the claims in suit and a reading of either the accused device or devices in the prior art on the claims in suit. This conclusion is not hypercritical.

It is borne out by the fact that, in many cases, where the invention is of the simplest mechanical type, experts are resorted to, *presumably* to explain the invention to the court, but *actually* to substitute the knowledge of the expert for the knowledge of the court derived either from ordinary experience or from a study of the letters patent themselves.

This is merely an attempt to get around the decisions which make the judge his own expert in such cases.

Illustrative is a situation which arose recently in my court while sitting in an out-of-state district. The patent in suit was one involving an insecticide especially compounded to kill an insect which infests strawberry plants. It was found that these insects were especially fond of apples. So the inventor devised an insecticide to consist of "powdered or pulverized" dried apples mixed with dried poison. The accused insecticide was a home-manufactured product consisting of apples which were run through an ordinary meat grinder to which the poison was afterwards applied. Expert testimony was offered to the effect that the word "powdered" was used in a broad sense, in milling, and would cover particles one-eighth of an inch large as contained in the accused mixture.

The difficulty with this explanation was several-fold. In the first place, the dictionary definition of powdered or pulverized implies dust-like material. The word "pulverize" comes from the Latin word *pulvo* meaning dust, and the latest definition is

> "to reduce, or be reduced, to very small particles, especially a fine powder or dust, as by beating, grinding or the like."

The other difficulty lay in the fact that in describing his invention, in the specifications, the inventor gave us a clue to what he meant by "powdered." He said that the two materials would be so mixed that one would go with the other.

The description was not of a piece of apple which became impregnated with poison, as in the accused mixture, but of two dust-like materials,—apple and poison,—which were so intermingled that they could not be separated.[5]

I felt that if I followed the expert, I would do violence not only to the ordinary meaning of the words, but also to the meaning which the inventor, himself, in his disclosure had attributed to them. So, despite the fact that the defendant *had no expert*, on the basis of my own knowledge, I held that the words were used in the ordinary sense and that the claim did not cover a combination of apple and poison which could not be said to be dustlike.

The expert who can be of the greatest assistance to the court is *the practicing scientist in the field*. The man who has made a life-study of the particular art or science and brings to the court the benefit of his research and study. This he can do by explaining in such fields as electricity, chemistry, physics, or other branches of knowledge, the principles to which the particular invention relates.

His aid is greatest, perhaps, in correlating the particular invention to the field in which it is claimed to be either a primary invention or a patentable improvement or combination of old elements. I would formulate the following rules for achieving this result:

He should confine himself strictly to facts.

He should relate his facts to the particular field of knowledge in its whole perspective.

Where necessary, he should make original experiments to support his conclusions. Such testimony

> "is entitled to weight—more weight, in view of the fact that it relates to matters actually within the knowledge and experience of the witness, than is given to testimony based simply upon theory or opinion. *Overweight Counterbalance Elevator Co. v. Improved Order of Red Men*, 94 Fed. 136, 36 C.C.A. 125."

However, while the law favors experiments, they must be fair and not conducted merely to either bolster up as invention what is not invention or to destroy a useful invention by theoretical experiments aiming to show its uselessness.

Of the latter kind of experiment, Judge Learned Hand has said:

> "It is established beyond question that the trade had no satisfactory paint remover before Ellis' discovery. . . . . Immediately his invention went into great use, and has substantially controlled the field. The business grew enormously, and now amounts to several hundreds of thousands of gallons per annum. Several persons attempted to disregard the patent; but they were unsuccessful, and much of the trade has taken out licenses. The patent at once filled the wants of the trade, and has held its ground for 11 or 12 years. There is surely some reason for this besides mere business exploitation. The need for a paint remover did not arise in 1902; it had always existed, as urgently before then as after; unsuccessful efforts had, indeed, been made to exploit several of the inventions containing phenol. All the ele-

5. As the file in the case is not in this district, and my opinion was oral, I quote from memory. What precedes, *in substance*, states the problem, although the exact wording is not given, except as to the words "powdered or pulverized."

6. Safety Car H. & L. Co. v. United States L. & H. Corp., D. C. N. Y., 1916, 237 Fed. 646, 651.

ments, therefore, exist which justify one in calling Ellis' patent a pioneer.

The defendant makes no effort to contradict this evidence, so I must suppose that it is not possible to do so. Its sole reliance is upon some experiments conducted ex parte by a young chemist of 28, whose qualifications consisted of a seven-year course in chemistry at Cooper Union, from which he graduated when he was 21, and during part of which he was employed elsewhere, and of subsequent work as a consulting chemist. Obviously, such experiments count for nothing against the weight of the evidence which the trade here affords, and courts have always so understood. *Rynear Co. v. Evans*, (C.C.) 83 Fed. 696; *Plunger Elevator Co. v. Standard Co.*, 165 Fed. 906, 911, 91 C.C.A. 584; *Bethlehem Steel Co. v. Niles* (C.C.) 166 Fed. 888. The value of an invention gets its safest test from what those think of it who are looking impartially for the best thing they can get for their purpose; when they have so decisively declared against the old forms and for the new, no trials on mice or selected panels count for anything whatever."[7]

In patents of a mechanical nature, the showing of large models constructed scientifically according to the teachings of the patent and the observation and demonstration of their workings in open court are, perhaps, the most useful tests by which the expert can aid the court.

These alone may be determinative of the issue. As said in an old case, *Market Street Cable Ry. Co. v. Rowley*, 1895, 155 U. S. 621, 625:

> "The defendant put in evidence a number of patents prior in date to the plaintiff's, and asked the court to compare the inventions and devices therein described with those claimed by the plaintiff. *No extrinsic evidence was given or needed to explain terms of art, or to apply the descriptions to the subject-matter*, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. The question was, then, one of pure construction and not of evidence, and consequently, was matter of law for the court, without any auxiliary fact to be passed upon by the jury."

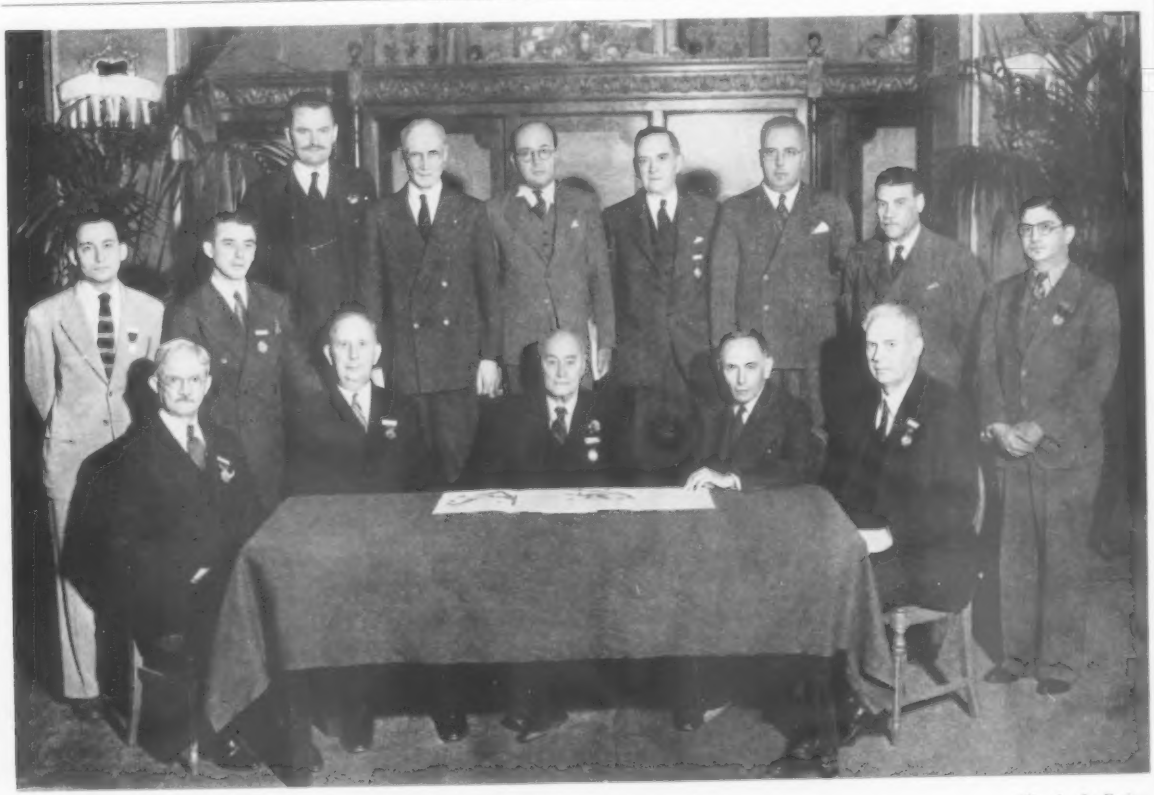
When this is the case, the expert should allow the court to make its own inferences. He may hurt his cause if he tries to go beyond this. For he invades the court's province. And, from time immemorial, courts have been human and have been sensitive about the invasion of their province by laymen.

On the whole, the scientist as an expert, can perform his greatest function if he adheres strictly to the presentation of facts, if he eschews theories and opinions and does not assume, even by indirection, to tell the court that a device does or does not infringe.

Within these limitations, the expert is a valuable adjunct to the court in patent cases.

And there is room even for the inventor as an expert and the patent attorney as an expert if they keep "their place" and stay "within the bounds."

7. *Chadeloid Chemical Co. v. Wilson Remover Co.*, (District Court, New York, 1915), 220 Fed. 681.



INTER-AMERICAN BAR ASSOCIATON—See next page Harris & Ewing

Meeting of the First Council, May 17, 1940, Mayflower Hotel, Washington, D. C.
Left to right, seated: Horacio F. Alfaro, Charles A. Beardsley, James Brown Scott, Luis Anderson, William Roy Vallance. Standing: Andres Pastoriza, Jr., Julio Vega Batlle, Howard S. LeRoy, William Cattron Rigby, Camilo de Brigard Silva, Hugh Carnes Smith, Eduardo Zuleta Angel, Dantes Bellegarde, Natalio Chediak.

INTER-AMERICAN BAR ASSOCIATION

By William Cattron Rigby
of the Washington, D. C., Bar

THE Inter-American Bar Association was organized May 16, 1940, by lawyers from many different countries of the Americas present in Washington, D. C., as delegates to the Eighth American Scientfic Congress, participating in its Section IX on "International Law, Public Law and Jurisprudence." A representative of the Canadian Bar Association was present and expressed approval, but was not authorized to speak formally on behalf of his association.

The Inter-American Bar Association is a new departure in this Hemisphere, among associations of lawyers. Its primary object is to develop friendly contacts among the lawyers of the different countries the whole length of the North and South American continents. In this respect its purpose is directly in harmony with the good neighbor policy of the administration of the United States. It is a remarkable fact that, as was noted, back in 1934, in the report of the American Bar Association's "Special Committee on International Bar Relations" at the Milwaukee meeting of the Association:

> "Ours is the only profession—almost the only occupation, indeed—that thus far has developed no form of affiliation between all the national organizations in its own field. It stands alone in that respect, and it should stand alone no longer."

That Special Committee was appointed in 1932 [57 A.B.A. Rep. 47]. It comprised a very distinguished membership, and was headed by our revered Colonel John H. Wigmore. The committee gave two years to a wide study of the problems involved. Its report went on to say [59 A.B.A. Rep. 621-622]:

> "The legal profession throughout the world has the strongest ties that ought to bind—ties of sentiment, ties of public duty, ties of common experience in human nature. One is apt to think of foreign law as something alien and irrelevant. And the *law* sometimes may be that —at least to many of us; but not the lawyers. Cicero, our great predecessor, long ago told us, 'Quibus autem Lex et Jus sunt inter eos communia, et civitatis eiusdem habendi sunt.' (Those whose common interest is Law and Justice should be regarded as belonging to the same civic fellowship.) The fact is that all who belong in the legal profession have a common fund of tradition and experience in all countries. Whenever a lawyer from abroad visits our bar associations, we treat him like a brother.
>
> That the organized Bars of the various nations are ready, in their latent sentiments, to be drawn together in some form of affiliation for personal contacts is evident from the correspondence held by this committee during the last two years."

The Committee concluded:

> "That the time is ripe for some sort of affiliation between the organized Bars of all nations, with a view to promoting closer personal acquaintance and mutual confidence, to adjusting controversies between nationals of different countries, to facilitating such litigation where unavoidable, and to advancing generally the administration of national justice in its international relations."

The Committee further concluded that "the most suitable nucleus for such an affiliation is the existing body known as the 'International Union of Advocates.' formed by delegates from the organized bars of 15 nations of Europe and Latin America."

In recent years, rapid world developments, together with a closer drawing of the ties of friendship and commerce in many directions among the countries of this Hemisphere, and the development of the "good neighbor" policy of the nations of the Americas, have increasingly indicated the value of an association of the lawyers of the different countries of the New World.

The initiative had already been taken in South America. In a letter, June 21, 1939, from Dr. J. Honorio Silgueira, of Buenos Aires, president of the Argentine Bar Association ["Federación Argentina de Colegios de Abogados"] to Dr. James Brown Scott, in relation to this subject, it is stated that a proposal "of a similar import' was formulated by the Argentine association as far back as 1926, "for the execution of which, this body has been laboring most strenuously since that date."

The American Bar Association soon fell in with this trend toward a separate inter-continental association in the Americas. At its meeting in 1937, on the initiative of Dr. James Brown Scott, the Association adopted through its House of Delegates a resolution reading (62 A.B.A. Rep. 393):

> "*Resolved*, That the American Bar Association, in its Sixtieth Annual Meeting, held in Kansas City, in the State of Missouri, expresses itself in favor of cooperation with the other twenty-one national bar associations of the American Continent in promoting uniformity of law in the Americas through the study and investigation of mutual problems of comparative law."

In 1939 the Section of Comparative and International Law presented two resolutions, one relating to an INTER-AMERICAN BAR ASSOCIATION, and the other to an Institute of Comparative Law for the Americas. Those resolutions were adopted by the House of Delegates, at its mid-winter meeting in January, 1940 (A. B. A. J., February, 1940, p. 115).

The Constitution states the formal purposes of the Inter-American Bar Association to be:

> "To establish and maintain relations between associations and organizations of lawyers, national and local, in the various countries of the Americas, to provide a forum for exchanges of views.
>
> To advance the science of jurisprudence in all its phases and particularly the study of comparative law; to promote uniformity of commercial legislation; to further the diffusion of knowledge of the laws of the various countries throughout the Americas.
>
> To uphold the honor of the profession of the law; and to encourage cordial intercourse among the lawyers of the Western Hemisphere.
>
> To meet in Conference from time to time for discussion and for the purposes of the Association."

The provisional officers elected to serve until the first Conference in Havana, are: *President*, Dr. Manuel Fernandez Supervielle (President of the Havana Bar Association); *Vice-Presidents* (One to be named by each country); *Secretary-General*, William Roy Vallance; *Assistant Secretary-General*, Curtis C. Shears; *Treasurer*, William Cattron Rigby.

CURRENT EVENTS

Institute at Convention

The following item which was a front page story in the August 7 issue of the Chicago Daily Law Bulletin will be read with interest. First, because it shows the wide interest in one of the feature events of the approaching convention in Philadelphia. Second, because it is a good presentation of the work of the Institute on Administrative Law and Procedure.

"BOTH by way of furthering consideration of a timely legal subject and illustrating the recently developed institute and conference method of post-graduate legal education, an institute on administrative law and procedure will be conducted during the annual convention of the American Bar Association at Philadelphia, September 9-13.

The institute is to be held under the auspices of the Association's Section of Legal Education and Admissions to the Bar. It is scheduled for the last day of the convention.

Popular Innovation

Institutes conducted by the section at past conventions have been a highly popular feature, giving the lawyer, as they do, a concentrated dosage of information on some subject of considerable practical interest to him.

The subject of administrative law and procedure will be considered under three main divisions: first, practical problems met in the trial of cases before administrative tribunals; second, ways, means and difficulties in connection with obtaining judicial relief from erroneous administrative orders; and third, some general conclusions.

Under the first head there will be considered three topics: when is the client entitled to notice and hearing? who must hear the case and how? and what are acceptable materials for administrative decision in quasi-judicial proceedings?

Problems Discussed

Topics under these heads include such practical and important problems as what to do to obtain a hearing when the tribunal refuses to allow it, use by the tribunal of subordinates to take and analyze testimony and whether that is a "fair hearing," and rules of evidence in administrative proceedings.

The general subject of judicial relief covers the available methods, the choice of the correct method, and the circumstances under which one can expect to get judicial redress."

Oklahoma Raises Bar Admission Requirements

THROUGH the recent action of its Supreme Court, Okahoma has joined the forty-two other states and the Territory of Hawaii which require, presently or prospectively, at least two years of college education or its equivalent for admission to the bar. The new Oklahoma rules provide that "On and after February 1, 1942, no person shall be permitted to register as a law student until he shall have graduated from an accredited high school and shall have completed at least two years of resident college work or its equivalent, such college work to consist of a minimum of sixty hours credit in a college recognized by the State University of the state in which said college is located." The provision as to legal education calls for successful completion of three years of study in a full-time law school or four years of study in a part-time law school, said school to be approved by the American Bar Association or by the Oklahoma Board of Bar Examiners. Law office study is still permitted, but the method of study and instruction must meet the approval of the Board.

Law Office Organization Articles

The JOURNAL *takes pleasure in reprinting the following editorial from the New Jersey Law Journal. In our August issue we carried an announcement that Mr. Smith's articles would be issued in the form of a reprint at a cost of 25c. The forms for office use (described in the articles) will be included. Lawyers wishing the reprint should promptly notify the* JOURNAL.

"LAW SCHOOLS dwell very little upon that phase of the practice of law which is an every day concern of the active practitioner, viz., the organization and conduct of his law office. Pleadings, briefs, memoranda of law, trial practice oral argument—all these are amply covered in the law schools. But office management, systematic organization, relations between attorney and client and other "bread and butter" aspects of the practice are covered sketchily in a gratuitous lecture or two by some local practitioner, or, in most cases, not at all. The bar usually learns these things by experience, by the exacting method of trial and error. The errors are sometimes costly.

A most practical contribution along these lines is made by Reginald Heber Smith, well-known and successful member of the Boston bar, in a series of articles that are currently appearing in the AMERICAN BAR ASSOCIATION JOURNAL. The series began with the issue of May, 1940, and are still continuing under the title of 'Law Office Organization.' Mr. Smith, drawing from a wealth of experience with an eminent Boston firm, sets out in great detail every phase of law office management. If his experiences have been common to some older practitioners, then others and certainly the younger lawyers and those just beginning their careers will find in these articles many helpful suggestions and aids for the efficient conduct of their offices. To Mr. Smith and the AMERICAN BAR ASSOCIATION JOURNAL the bar owes a debt of gratitude for making available a needed supplement to the formal legal education of the law schools."

[*New Jersey Law Journal, August 1.*]

New Dean—Ohio State

ANNOUNCEMENT is made that Arthur T. Martin, for some time Professor of Law, has been appointed the Dean of the Law School at Ohio State University. He succeeds as dean Hon. Herschel W. Arant, recently installed as Judge of the U. S. Circuit Court of Appeals for the 6th Circuit.

Dean Martin announces that a new curriculum has been put into effect which "places emphasis on vocational competency and the training of socially-minded lawyers." The content of the professional curriculum has been drastically revised. Time allocated to some traditional courses has been reduced to make free time for new materials. Sequences have been changed "to have areas of law developed in a fashion logical from the student's viewpoint. More courses are required to insure training in all areas basic in the education of a lawyer, and new courses have been added to secure the inclusion of new legal materials and to improve methods of instruction.

Most of the traditionally important subjects are required in the first two years of law, to increase the time in the third year for new courses.

The general sequence of the course is such as to give the student an expanding view of the legal system as he progresses through his three years of study, with special emphasis in the third year on the synthesis of legal, economic, political, social, and practical principles

Department of Justice Its Organization

The JOURNAL *has been receiving, with much appreciation, from the Department of Justice Library, in Washington, a publication called "Justice Library Review." It is edited by the Librarian of the Department of Justice.*

The following items from that publication will be read with interest by the lawyers of the entire country. They contain valuable information of practical significance, which could not be otherwise found without much difficult research.

Office of the Attorney General

"THE post of Attorney General was created by the Federal Judiciary Act of September 24, 1789, which provided for a Supreme Court with a Chief Justice and five Associate Justices, a District Court and a District Judge for each of the states, and three Circuit Courts. Governor Edmund Randolph, of Virginia, legal adviser to President George Washington, was nominated to fill the position at an annual salary of $1500 a year, and occupied the Office of Attorney General in the Federal Capital in New York City.

With the removal of the seat of government to Washington, the various departments were housed in nondescript buildings grouped around President Washington's residence. No accommodations, however, were provided for the Attorney General, who was expected to furnish his own quarters, fuel, stationery and clerk. Indeed not until 1822 was the Attorney General furnished with official quarters—a small room on the second floor of the old War Department Building. For nearly fifty years, until 1870, the office of the Attorney General was housed in various governmental buildings; despite his important duties as the Nation's chief law officer he was the 'forgotten man' of his day.

Finally, after 81 years of eventful existence, the office of the Attorney General had expanded to such an extent, both in functions and in personnel, that it became in reality one of the principal executive departments of the Federal Government. In recognition of this fact, the Congress enacted the law of June 22, 1870, signed by President Ulysses S. Grant, which established the United States Department of Justice.

Today, 150 years after the establishment of the post of Attorney General, the Department of Justice has become the largest law office in the world! More than 10,000 persons are employed in the Department, over 2,700 of whom are located in Washington. These include some 1,300 attorneys—600 at the seat of Government.

The affairs and activities of this vast organization are directed by the Attorney General. Besides the offices of Solicitor General and Assistant to the Attorney General, there are several divisions: Administrative, Antitrust, Bonds and Spirits, Claims, Criminal, Customs, Lands and Tax. There are four bureaus: Alien Property, Investigation, Prisons and War Risk Litigation.

The Attorney General has general supervision of the work and activities of United States attorneys and their assistants, United States marshals and deputies, personnel in the field offices of the Federal Bureau of Investigation and field employees in the Federal Bureau of Prisons.

As the chief law officer of the Federal Government, the Attorney General represents the United States in legal matters and gives advice and opinions when requested by the President or heads of the executive departments. He appears in the Supreme Court of the United States in cases of exceptional importance and exercises general supervision of legal matters in which the United States is a party."

Office of the Solicitor General

"The chief function of the Solicitor General, the second highest official in the Department of Justice, is the conduct of the Government's litigation in the Supreme Court of the United States. He is responsible for the briefs and the oral arguments presented to the Supreme Court on behalf of the Government and its departments and the independent agencies of the Government. The extent of these duties may be judged by the fact that during the last court year 48 per cent of the 186 cases argued before the Court were cases in which the Government participated. The Government was successful in about two-thirds of its cases.

The briefs filed with the Supreme Court are ordinarily prepared in the first instance by another division of the Department of Justice or by the legal staff of an executive department or independent agency. The Solicitor General, assisted by a staff of eight attorneys, reviews these briefs and revises them to the extent deemed necessary. The Solicitor General designates the persons to make the oral arguments; the cases which he does not argue himself are assigned to members of his staff, to the Assistant Attorney General in charge of the division concerned or members of his staff, or to the General Counsel of the department or independent agency involved in the litigation.

The government cases presented to the Supreme Court range from those with wide public interest, such as the great constitutional problems of the last few years, to those of the narrowest technical interest. The Government's opponents, in either type of case are likely to be numbered among the most successful lawyers in private practice.

As a part of his duties in presenting the Government's cases to the Supreme Court, the Solicitor General must determine which of the cases lost by the Government in the lower federal and state courts will be taken to higher courts. During the last year appeal was authorized in 36 per cent of the 657 cases considered. Except in a rather narrow category of cases, the Supreme Court is authorized, through certiorari, to select those cases which it chooses to hear. In the fiscal year 1939, the Solicitor General asked the Supreme Court to review by certiorari 16 per cent of the cases lost in the lower courts. During the last court year the Court granted 72 per cent of the Government's petitions and only 11 per cent of its opponents."

Anti-American Propaganda in Japan

THE JOURNAL is evidently on the official propaganda-list of Japan. We receive regularly a colored weekly magazine, the *Japan Times*. It is posted in Tokyo, Japan, and marked on the cover "printed in Japan"; and costs, "one year $8.50 (U.S.)." It is regularly filled with propaganda boosting Japan's foreign policy, and particularly attempting to justify what is called "The China Incident." The magazine is consistently anti-American. The following item clipped from the front page of the July 25th issue is typical:

"Comments

Great Britain gave up the Anglo-Japanese Alliance to please Washington. So she had to build Singapore naval-air base at vast expense. Which would the British people prefer today, Japan as a dependable ally in the Pacific without fortified Singapore, or Japan as a rejected ally with an expensive but not too useful Malayan Gibralter? Possibly they would prefer to put their trust in men rather than in machines, in Japanese people rather than in a fortress, considering what has happened to forts in the past few months. It might pay better if all nations were to consider pleasing Japan on the Western and Southern parts of the Pacific rather than conforming to American foreign policy which has proved so disastrous for the world."

Note on the Art of Nomenclature

It may be *common sense* or it may be *"alphabet soup,"* but we have an idea to propose.

The words AMERICAN BAR ASSOCIATION JOURNAL comprises twenty-nine letters; and constitute a mouthful of syllables when they are read and pronounced out-loud. Some of us on the JOURNAL are made to realize this fact every day. When, for instance, over the telephone one tries to explain that "The Managing Editor of the AMERICAN BAR ASSOCIATION JOURNAL is speaking," he frequently finds his listener has gone to sleep, as if by a lullaby. On formal occasions, and indeed in all cases where the words American Bar Association are used when dealing with the Public, the full form should always be employed. But the question arises whether it is not good sense to use the short expression ABA when speaking of it "in the family," as for example in this Note. The conservatism of lawyers is sound and right. But there is such a thing as the Art of Nomenclature. One branch of that Art is the use of intriguing abbreviations for tongue-twisting phrases used as names. The use of initials instead of a person's name is an illustration of this art. The common use of nick-names is another evidence of it. The terms "U. S. A.," "G. O. P.," "S. E. C.," have been accepted into our current vocabulary. The Art of Nomenclature is used in Library work and very largely in the Sciences, such as Chemistry, Geometry, etc. The Law can make use of that Art much more than it does. Why should we not speak informally of the ABA when everybody knows what is meant? What about adopting the short form in editorials and special articles, and in general in the JOURNAL. We would appreciate comment on this idea.

Free Legal Aid to Soldiers

THE JOURNAL has read an interesting item in the *Law Institute Journal* of Melbourne, Australia, for July 1st, 1940, on "Free Legal Aid to Soldiers." It there appears that the Law Institute of the Province of Victoria, Australia, has organized a scheme for affording free legal aid to soldiers and their dependents. Among other things, the item says:

> "The Institute is continuing its scheme for affording free legal aid to soldiers and their dependents. . . . Such services are extended to intending recruits. It was pointed out by the military authorities that many intended recruits had doubts about their financial and domestic obligations and hesitated to enlist until their problems were solved for them. Free legal aid has already been given to about 300 soldiers and others who have applied for assistance.
>
> "The Institute desires to express its appreciation of the help given by those solicitors whose names are already on the roster and earnestly asks other solicitors to send in their names as soon as possible, so that the solicitors who are now carrying on the work shall not be unfairly overburdened."

It seems likely that within the next few months several hundred thousand citizens in the United States will be inducted into military services. The question arises whether local bar associations throughout the country could not do a good work in aid of the public interest by following the example of the Law Institute of the Province of Victoria in Australia. The job of furnishing legal aid to such persons is one which must inevitably be handled in local areas.

The "And/Or" Corruption

THE JOURNAL takes much satisfaction in the campaign which it instituted and carried on some years ago against the flagrant use of that perversion of the English language "and/or." Largely as a result of the publicity given to the matter by the JOURNAL and other publications which followed suit, the frequent use by lawyers of that perverted expression has been stopped in this country. Occasionally, however, the expression again crops up. In this connection the following item from the *London Times* of April 11, 1940 (which was reprinted in the *Law Institute Journal* of Melbourne, Australia) is of interest:

> "'And/Or' in Affidavits. — During the hearing of a case in the Chancery Division yesterday Mr. Justice Bennett said: "What does 'and/or' mean? You may use it in a commercial document if you like, but in an affidavit it makes the deponent's oath quite worthless. It is a recent practice, and makes it quite impossible to determine what a deponent is swearing. One day I will deal with it by making someone pay the costs of an affidavit framed in that way. We must stop it."

Professions and Sherman Anti-Trust Act

[Editorial Note: The following comment will be read with interest in connection with the article in our July issue, "Restraint of Trade," by Walter P. Armstrong.]

"NOW that professional organizations apparently must reckon with the Sherman Anti-Trust Act, just what activities to improve professional standards are permissible for bar associations?

Such is the question which seems to have been raised by the Supreme Court's refusal to review the American Medical Association case, a decision so broad as to be regarded as bringing legal professional activities within the scope of the Sherman Act.

Some suggestions as to the answer of the new problem confronting bar associations may be forthcoming in the fall when the Department of Justice expects to bring the medical case to trial in the District of Columbia Federal District Court.

Inasmuch as the case involves the efforts of medical groups to prevent the establishment of a group health association, what the courts decide is likely to have an important bearing on what bar associations may legally do in the way of curbing or regulating the growth of low-cost legal bureaus and service experiments.

In the petition filed on behalf of the Association in which Supreme Court review was asked, it is stated that:

'The Bar Association, in its attempted widespread effort to improve its personnel, better its membership, supervise law lists, cause the approval of law schools for student education, and clarify and improve standards for admission to the bar, might well be subject to the same kind of prosecution (as the American Medical Association).'

Questions yet to be determined in the courts are whether professional organizations of doctors and lawyers may prohibit their membership from accepting positions with medical and legal service-projects."

—American Law and Lawyers,

Bar as a Balance Wheel

"In these days of national "jitters" it is the duty of the bar to act as a balance wheel, not alone in national policies but more especially in public sentiment. The right to free though and free speech is the heritage of the American people and upon the shoulders of the lawyers rests the burden of the preservation of that heritage. In these days when "fifth column" activities are being sifted let us take the lead in seeing that that sifting is done fairly. Not only fairly, but completely. The bar must take the lead in demonstrating that freedom of speech and freedom of thought does not imply freedom to conspire for the overthrow of the established government. No government worthy of the name can tolerate such conspiracies, particularly when they are fostered by a foreign power. The danger however lies in the inability of the public to distinguish between such freedom and actual conspiracy." [South Dakota Bar Journal, July 1940.]

PAN AMERICAN UNION

Our readers will be interested in the following account of the origin and present activities of the Pan American Union. Particularly so, because of the article in this issue, written especially for the JOURNAL, *by Dr. Leo S. Rowe, Director General of that important international organization. The following item is the semi-official statement about the Pan American Union taken from the official booklet of the "Eighth American Scientific Congress," held in Washington, May 10 to 18, 1940.*

FIFTY years ago, between October 2, 1889, and April 19, 1890, representatives of the nations of America met in Washington in what was not only an interesting but in many respects a novel gathering. Other international conferences held in the past had been convened principally to consider wars or the results of wars, or to take measures in anticipation of war.

The First International Conference of American States met not to reestablish but to consolidate peace, to reenforce and strengthen the principles governing friendly relations between the nations of the Western Hemisphere. It established a precedent and laid the groundwork for a new era in inter-American relations. It also set an example which, after the turn of the century, was followed generally in international relations.

The First Conference, near the end of its labors, created the international organization now known as the Pan American Union, which will observe its fiftieth anniversary in April, 1940. The establishment of that institution was a pioneer experiment in international relations, and as in nearly all pioneering attempts, the beginnings were extremely modest. A committee report approved at the Conference on April 14, 1890, established an association of nations known as "The International Union of the American Republics." This Union was to function through an office called "The Commercial Bureau of the American Republics," which was to serve as an agency "for the collection, tabulation, and publication . . . of information as to the productions and commerce, and as to the customs, laws, and regulations of their respective countries."

In the ensuing five decades the international secretariat so modestly inaugurated in 1890 has experienced a steady evolution with respect to both organization and scope of activity.

Organization

In 1896 a permanent Executive Committee was created, composed of five representatives of the member nations—four to be selected by lot, the fifth to be the Secretary of State of the United States as *ex officio* Chairman. The Executive Committee was to act as a board of supervision and administration, and was the forerunner of the present Supervisory Committee, also composed of five members, which as its title indicates, supervises the work of the Union when the Governing Board is in recess. In 1899 the powers of the Executive Committee were further enlarged to include appointment of and supervision over officials of the Bureau.

At the Second International Conference of American States (Mexico City, 1902) the direction of the organization was entrusted to a Governing Board composed of the diplomatic representatives in Washington of all the American Republics and the Secretary of State of the United States. The Bureau was now an international organization in a real sense of the word, and every member government had a voice in its direction. At the same Conference, the name of the office was changed to "The International Bureau of the American Republics," a title that was used until 1910, when the present name was adopted.

Since 1902 several minor changes in the plan of directive organization have been made. At the Fifth Conference, held in Santiago, Chile, in 1923, it was provided that any republic which did not have a diplomatic representative accredited to the United States might appoint a special representative on the Governing Board. At the same time it was agreed that the Chairman and Vice Chairman should be elected annually by the Board. A further step in placing the direction of the Pan American Union on a completely international basis was taken by the Sixth Conference at Habana in 1928, in a resolution providing that the Governing Board shall be composed of the representatives that the American Governments may appoint. As at present constituted, the Union is fully and completely international in organization, with each of the member States having an equal voice with all the others.

Activities of the Union

The change in organization of the Pan American Union has been accompanied by an increase in the scope of its activities. Within a few years after the Commercial Bureau of the American Republics had been established, its work was extended to include all subjects relating to the economic life and development of the member countries. With each succeeding International Conference of American States the functions of the Union have been enlarged until they now include virtually every phase of activity—scientific, economic, juridical, cultural, and social. The activities of the Union fall within two classifications—the official and the unofficial.

In its official capacity, the Pan American Union serves as the permanent organ of the International Conferences of American States. The Union prepares the program and regulations of each conference; compiles documentary material on the topics included in the agenda for the information of the delegates; and, following each conference, assists in securing action on the resolutions adopted. This is a most important function, inasmuch as one of the great dangers confronting all international conferences is the absence of a permanent organization to give effect to the conclusions reached by such assemblies. In this respect the Union performs a most important service, and its record is most encouraging.

In addition to the International Conferences of American States, which meet usually at five-year intervals, there have been a large number of special or technical conferences of a distinctly Pan American character. The agenda of the International Conferences of American States are so inclusive, and the time available for the consideration of the several topics is frequently so short, that the delegates are unable to give to all the subjects the detailed attention that their importance merits. Consequently it has become the practice in recent years to refer many of these subjects to special or technical gatherings, which meet in the interval between the International Conferences. Several of these specialized meetings have been held over a long period of years, particularly The American Scientific Congresses, which were initiated at the close of the nineteenth century, the Pan American Sanitary Conferences, and the Pan American Commercial Con-

ferences. During the last fifteen years gatherings of this character have increased greatly in number, and the subjects which have been considered cover virtually every phase of inter-American activity. Some of the most important inter-American accomplishments of the last few years are the results of these special or technical conferences.

An important function recently entrusted to the Pan American Union by the International Conferences is that of serving as the depository of instruments of ratification of treaties and conventions. For many years the Union has been the custodian of the archives of these Conferences, and at the Sixth International Conference of American States held in Habana in 1928, the Union was made the official depository for the instruments of ratification of nine of the eleven conventions signed at that time. This procedure, which was followed at subsequent conferences, has the decided advantage of concentrating in one place all information as to the status of treaties and conventions signed at Pan American Conferences.

International law and the development of machinery for the preservation of peace have always been subjects of major interest at the International Conferences of American states, and a comprehensive organization has been developed to codify international law. In this activity the Pan American Union, through its Juridical Division, serves as the central coordinating agency maintains close contact with the several National and Permanent Committees and the Committee of Experts on Codification that have been established.

On January 1, 1940, the Division of Labor and Social Information was established in the Union, to serve as a center of information on labor matters in the Americas; maintain contact with labor organizations in the different countries; undertake the compilation and publication of information and data on labor activities and related legislation in the various American Republics; and to answer inquiries on such subjects.

In its unofficial capacity, the Pan American Union is a great clearing house of information on questions affecting the interest and welfare of the nations and people of the American Continent. The Union serves as the cooperating organ of the member governments and furnishes to them any information that may be required by their various administrative departments. In like manner the Union extends its facilities to the citizens of all the Republics in the Western Hemisphere, and each year answers thousands of inquiries covering a wide range of subjects.

THE "PALACIO MONROE" IN RIO DE JANEIRO, BRAZIL

Named in honor of the author of the *Monroe Doctrine;* scene of the *First Pan American Conference* in 1898.

The compilation of commercial statistics and information on customs laws and regulations was the original and at one time the sole object of the Union. Not only has this work been continued, but at present the Pan American Union is a source of information on practically every field of economic endeavor in the Americas. Annual reports are published on the export and import trade of each country, and economic subjects of current interest are discussed in a monthly report entitled "Commercial Pan America."

The Bulletin, which is the official organ of the Union, and which appears in English, Spanish, and Portuguese editions, has been published uninterruptedly for forty-six years, and its files and current issues contain valuable articles on official matters, contemporaneous affairs in the Americas, and topics of general interest.

The Columbus Memorial Library of the Union has one of the most important collections of books, pamphlets, and periodicals pertaining to the American Republics and the relations between them. Created at the First Conference, the Library now contains more than 100,000 volumes, and is used extensively by students and others interested in the countries, members of the Union. By legislative or executive decree it has been made the depository of the official documents of many governments, and consequently is in possession of a wealth of the legal instruments, federal reports, as well as other documents of a similar nature of the twenty-one Governments.

A function of growing importance during recent years is the promotion of closer cultural ties between the Americas. The Division of Intellectual Cooperation collects and disseminates information on the various aspects of cultural life in the twenty-one member republics. It concerns itself with the fields of education, science, literature, and the arts, and its resources are always at the disposal of teachers, students, and other interested persons. To spread a knowledge of cultural activities, the division issues for free distribution mimeographed bulletins in English, Spanish, and Portuguese, which give informally the news of the intellectual movement throughout the Continent.

It should be observed that the Pan American Union does not engage in political activities. In fact, by the terms of resolutions adopted at the Fifth and Sixth International Conferences of American States and now governing the Union, it is specifically precluded from exercising functions of a political character. There is no thought of the application of sanctions or of the use of force to compel the fulfillment of international obligations. The Pan American Union, and the Pan American movement in general, are predicated on the positive idea that peace is the accepted basis of international relations, rather than on the negative attitude that peace is merely the avoidance of strife. The basic idea underlying the organization of the Pan American Union is the development of a spirit of cooperation between the American Republics by making it possible for all to benefit from the experiences of each. Through constantly united action a spirit of continental solidarity has gradually developed, which is of incalculable value in the maintenance of friendly relations and in the settlement of political differences. The habit of united action has become so well established that now any question arising between two or more republics assumes a continental character and importance. Thus a distinctly American policy is gradually being developed, in no sense antagonistic to any other part of the world, but emphasizing the unity of interest and the unity of purpose of the American Republics. Such a spirit cannot help but contribute to the development of good feeling on the American Continent, and may well serve as an example to the world at large.

American Association of Law Libraries

IN 1939 Dr. Arthur S. Beardsley, President of the American Association of Law Libraries, appointed a committee of law librarians to consider the matter of local law library service. The JOURNAL *is recently in receipt of a report of that committee from Arie Poldervaart (librarian of the New Mexico Law Library), chairman of the committee. Pertinent excerpts from that report are herewith set out.*

The entire question of greater and better local law library service is daily becoming of more and more importance with an ever increasing number of law books and a constantly increasing cost of maintenance and supplementation. It has become obvious to nearly everyone connected with the legal profession that a young lawyer now starting into private practice is seriously handicapped by lack of an adequate legal library. It is only the lawyer with an established practice and a sizeable income who can maintain even the most necessary sets of reports and treatises. The young lawyer of ordinary means either struggles along haphazardly without them, joins a firm which has a sizeable library or opens up in a location where he has ready access to a public legal library or the library of a well established firm.

It is the objective of this committee to organize and develop interest in the improvement of local law library service in order that all lawyers in both large and small communities may have ready access to legal works which are essential to conducting a successful practice. It is one of the aims of this committee to discover, develop and suggest ways of solving this problem and then to conduct a campaign of educational publicity through state bar associations, the American Bar Association, and local bar societies so that definite plans for meeting the problem may be adopted as far as possible in every state.

Community Law Libraries

One step toward solving the problem is suggested by establishment of a community law library, in towns where there are at least several lawyers, to house such books as are not in constant use in the individual lawyer's office. Such a library can be maintained simply by having each lawyer place all but his constantly used books in this library. The Bar Association of Illinois has had a committee working on this matter for some time.

To be adequate the local library should have as much of the National Reporter system as possible, the American Digest system, current encyclopedias, needed citators, and a few other books generally regarded as belonging exclusively to the reference class. A set of the session laws of the home state could also be appropriately located here. The latest statutes of the home state and its reports in most instances will be found or desired in each lawyer's office library, but a set of these in the community library would prove extremely helpful. It is suggested that provisions can undoubtedly be made in nearly every state by statute or court order to have these reports and statutes made available without cost to the community law libraries.

Sent Free to Lawyers

The ABA JOURNAL is authorized to announce that the Journal of the American Judicature Society will hereafter be mailed free to lawyers who will make application for it. The American Judicature Society is anxious to get as large a mailing list of lawyers as possible. The articles and items which have appeared in the Journal are of high interest to all lawyers concerned with what may be called the Jurisprudence side of the law. The JOURNAL is glad to make this announcement of the generous offer to the bar of the American Judicature Society.

To Members of the American Bar Association:

We print below a membership application form for your convenience, in the event that you have a friend or associate whom you wish to propose for membership.

Applications filed during the period between July 1 and September 30 should be accompanied by initial dues of $8.00, or $4.00 if the applicant has been admitted to the bar less than five years.

Application for Membership
AMERICAN BAR ASSOCIATION
1140 North Dearborn Street
Chicago, Illinois

Date and place of birth .....
Original admission to practice ..... State ..... Year
Other states in which admitted to practice (if any) .....
Bar Associations to which applicant belongs .....
.....
White ☐ Indian ☐ Mongolian ☐ Negro ☐
Name .....
Office Address ..... Street ..... City ..... State
Home Address ..... Street ..... City ..... State
Endorsed by ..... Address .....
Check to the order of American Bar Association for $..... is attached.

BAR ASSOCIATION NEWS

Hammel's
SAMUEL M. JOHNSTON
President, Alabama State Bar Association

Alabama State Bar Association

APPROXIMATELY four hundred members of the bench and bar of Alabama gathered at Huntsville June 14 and 15 for the sixty-third annual meeting of the Alabama State Bar Association. The meeting was called to order by President Richard T. Rives. The session was featured by an address by Hon. Hatton W. Sumners, chairman of the Judiciary Committee of the House of Representatives. He spoke without notes or manuscript on the subject "Relation of State Government to Federal Government." Those who heard Congressman Sumners could not escape the conclusion that one of the principal reasons for the waning strength of local government in America lay in the failure of lawyers to live up to their responsibilities as guardians of the democratic heritage in their respective communities.

Chief Justice Robert S. Reid of the Supreme Court of Georgia delivered one of the principal addresses at the session, on "What a Lawyer Discovers on Becoming a Judge." In substance, Justice Reid declared that the bar will be esteemed in proportion as justice and truth are served; that to become a great lawyer one must have some basic qualities of a great man; and that vigilance must be exercised to the end that the legal profession shall never become a cheap business.

At the annual dinner the guest speaker, Fitzgerald Hall, president of the Nashville, Chattanooga and St. Louis Railroad, spoke informally on "Democracy."

Hon. O. John Rogge, Assistant Attorney General of the United States, spoke before a joint meeting of the state bar association and the Alabama Circuit Solicitors' Association on the recent "Louisiana Prosecutions."

Samuel M. Johnston, of Mobile, a member of the Board of Commissioners of the state bar, was elected president for the year 1940-41.

HAROLD M. COOK,
Secretary.

Iowa State Bar Association

The forty-sixth annual meeting of the Iowa State Bar Association was held at Waterloo, June 7 and 8. President Harley H. Stipp presided, and devoted his presidential address to the consideration of a campaign Iowa lawyers have been making looking toward giving larger rule-making power to the state supreme court. Convention speakers included John T. Curtis of Bridgeport, Connecticut, who spoke on "Modernized Procedures, Their Bearing on Public Relations," and Professor Edson R. Sunderland of the University of Michigan Law School, who discussed "Improvement of Appellate Procedures." The annual banquet was addressed by Arthur T. Vanderbilt, past president of the American Bar Association, who made a strong plea for the improvement of the administration of justice as a means of preserving our democratic form of government.

Sessions of the Iowa Junior Bar were held concurrently with those of the senior session. New officers of the Junior Bar are: Richard H. Plock, president; Ray Nyemaster, vice president, and R. R. Buckmaster, secretary.

For the first time in its history the Iowa State Bar Association will have a permanent full-time secretary. Paul B. DeWitt, former assistant secretary of the American Judicature Society, was elected to that post. Permanent offices for the association have been opened in Des Moines.

The officers elected for the year 1940-41 are: George C. Murray, president, Sheldon; W. A. Smith, vice president, Dubuque; and B. B. Druker, librarian.

PAUL B. DEWITT,
Secretary.

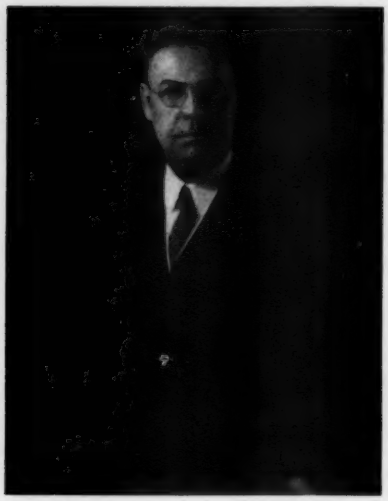
G. C. MURRAY
President, Iowa State Bar Association

Minnesota State Bar Association

THE 1940 annual meeting of the Minnesota State Bar Association was held in Minneapolis, July 10 and 11. The principal speaker was Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, who spoke on "Today's Challenge to the Judiciary." At the banquet the association acted as host to Hon. Andrew Holt, Associate Justice of the Supreme Court of Minnesota, commemorating his 85th birthday and his long and distinguished service on the bench of Minnesota. Judge Gunnar H. Nordbye of the United States District Court was the principal speaker at the banquet. The session was in part devoted to two institutes; one on Practice Before Administrative Boards, which is the same topic which will be discussed by an institute at the Philadelphia meeting of the American Bar Association; also an Institute on Judicial Research. [Concerning this see a special item appearing elsewhere in this issue of the JOURNAL.]

Officers elected for the year 1940-41 are John A. Burns, President, St. Paul; Joseph P. O'Hara, Vice President, Glencoe; J. Neil Morton, Treasurer, St. Paul; Horace VanValkenburg, Secretary, Minneapolis.

HORACE VANVALKENBURG,
Secretary.



Bolivar Studios

JOHN A. BURNS
President, Minnesota State Bar Association

Idaho State Bar

THE annual meeting of the Idaho State Bar was held at Pocatello, July 1-3. Walter H. Anderson, president of the bar, presided. One of the topics discussed was that of the uniformity of title examinations and costs of abstracts. Another topic discussed was that of schools for practicing lawyers about which the interest manifested throughout the entire bar was most favorable.

One of the principal features of the convention was the address by Robert F. Maguire of Portland, Oregon, member of the Board of Governors of the American Bar Association, who discussed the value to the lawyer and the public of bar association activities. W. E. Stanley, President of the Kansas State Bar, gave an interesting address on the "Duties and Opportunities of Lawyers," particularly in these times.

ABE GOFF
President, Idaho State Bar

The officers elected for the year 1940-41 are Abe Goff, President, Moscow; C. W. Thomas, Vice President, Burley; Sam S. Griffin, Secretary, Boise.

SAM S. GRIFFIN,
Secretary.

Delaware State Bar Association

AT the July 26th meeting of the Delaware State Bar Association, James R. Morford of Wilmington, Delaware, was elected President for the year 1940-41. Other officers elected were Vice Presidents: Robert G. Houston, Georgetown; George M. Fisher, Dover; George C. Hering, Jr., Wilmington; Secretary, William Marvel, Wilmington; Treasurer, Thomas C. Frame, Dover.

JAMES R. MORFORD,
President.

Mississippi State Bar

JACKSON was host to the annual meeting of the Mississippi State Bar on June 27 and 28, 1940. More than four hundred members and guests were in attendance.

The eloquent address of the president, W. H. Watkins of Jackson, was heard with appreciation as he discussed recent decisions of the Supreme Court of the United States. Mr. Watkins called attention to two outstanding characteristics of the Court: first, that "in economic, commercial and social reform questions its decisions have not been entirely consistent, but have shown great flexibility and interpretation," while upon the other hand "in dealing with questions of those inalienable rights provided in the Bill of Rights of the Constitution of the United States, it has never faltered but has been unwavering and steadfast."

Immediately following the president's address Charles E. Dunbar of New Orleans, Louisiana, discussed "The Program and Service of the American Bar Association to the Public in Improving Standards for Admissions to the Bar." Much interest was manifested by members of the bar in Mr. Dunbar's presentation of this subject.

The feature address of the Thursday afternoon session was made by Francis S. Harmon of New York City on "A Mississippi Lawyer Looks at Hollywood." Mr. Harmon was formerly a resident of Mississippi but is now with the Motion Picture Producers and Distributors of America, Inc., New York City.

Wm. Shewell Ellis Studios

JAMES R. MORFORD
President, Delaware State Bar Association

The speakers at the annual banquet Thursday evening were Will Percy of Greenville, Mississippi, and Dr. Robert J. Farley of Tulane Law School.

The report of the Junior Bar Section, made by its chairman, Charles A. Sisson of Clarksdale, proved that the Junior Bar Section is wide awake and alert to every need of the bar association. Walter P. Armstrong of Memphis, Tennessee, had been the guest speaker for the section's annual meeting and had spoken on "The Young Lawyer Faces the Future."

The climax of the convention was the address of Assistant Attorney General Thurman Arnold of Washington, D. C., on the subject of "The Anti-Trust Laws and the Consumer." He discussed the problems that arise out of our present need to spend billions for defense and the effort that is being made to solve them. Mr. Arnold was masterful in the intelligent handling of his subject and was received with enthusiastic applause.

The election of officers was held Friday afternoon, the following being elected to direct the activities of the association for the ensuing year; W. E. Morse, President, Jackson; Elbert Johnson, First Vice-President, Indianola, and E. L. Brunini, Second Vice-President, Vicksburg. W. S. Welch of Laurel was elected as the Mississippi State Bar member to the House of Delegates of the American Bar Association.

Gulfport was selected as the next place of meeting.

ALICE NEVELS,
Secretary.

W. E. MORSE
President, Mississippi State Bar

Bar Association of the State of New Hampshire

THE annual meeting of the Bar Association of the State of New Hampshire, was held in New Castle, New Hampshire, on June 29 with President Jeremy R. Waldron presiding and about eighty-six members of the bar present.

President Waldron read a letter dated May 31, from the Rhode Island Bar Association, with reference to joint dues between state bar associations and the American Bar Association. The secretary was directed to inform the Rhode Island Association that since the dues of the American Bar Association and the New Hampshire Bar Association are $8 and $3 respectively, and since neither association can do with lower dues, an arrangement for joint dues was impracticable.

James B. Godfrey, Chairman of the Committee on Advanced Legal Education, introduced Professor Warren A. Seavey of Harvard Law School, who delivered a talk on the subject, "Some Aspects of the Law of Torts," with particular reference to a list of New Hampshire cases.

The principal speaker of the evening session was Hon. Harrie B. Chase, Judge of the U. S. Circuit Court of Appeals, 2nd Circuit.

The Nominating Committee reported the following list of nominations:

President, Robert W. Upton of Concord; Vice-President, Hon. Henri A. Burque, of Nashua, Chief Justice of the Superior Court; Secretary-Treasurer, Conrad E. Snow of Rochester; Delegate to the American Bar Association, James B. Godfrey of Concord to fill the unexpired term of Ralph E. Langdell, resigned, and Conrad E. Snow of Rochester for a 2-year term to begin at the adjournment of the September meeting of the American Bar Association.

CONRAD E. SNOW
Secretary

State Bar Association of Wisconsin

THE State Bar Association of Wisconsin held its annual convention June 27-29 at Green Lake, Wisconsin. Registration numbered 357. The meeting was presided over by President Harlan B. Rogers. One of the interesting topics discussed by the association was "Can the bar of Wisconsin do anything to improve the work of the administrative agencies of the state?"

One of the main features of the program was an address by Professor L. Joslyn Rogers of Toronto, Canada, on "Scientific Evidence Before the Canadian Criminal Courts." Professor Rogers is a member of the faculty of the University of Toronto in the department of chemistry, and is official toxicologist for the province of Ontario.

Another important address was that of Hon. Albert L. Reeves, Federal District Judge, Kansas City, Missouri, on "Organized Crime versus National Security." Judge Reeves had a prominent part in prosecuting the vote fraud and gangster cases in Kansas City. At the annual banquet the guest speaker was Hon. Charles A. Beardsley President of the American Bar Association, who discussed the question of propaganda, particularly in the field of education.

Officers for the year 1940-41 are William Doll, President, Milwaukee; Walter W. Hammond, Vice President, Kenosha; Gilson G. Glasier, Secretary and Treasurer, Madison.

GILSON G. GLASIER,
Secretary.

WILLIAM DOLL
President, State Bar Association of Wisconsin

Allied News-Photo

MAURICE H. MACMAHON
President, Detroit Bar Association

Detroit Bar Association

THE Detroit Bar Association is the oldest organization of lawyers in the State of Michigan, having been founded in the year 1835, the same year in which Michigan was admitted to the union. The membership, now the largest in the history of the organization, is approximately 2,000. The association work is carried on by twenty-eight ac-

[*Continued from page* 751]

tive committees, to which over 300 busy lawyers and judges generously devote their time and effort.

The association has an active Junior Bar Section which conducted eight meetings during the past year. The Junior Bar Section this year conducted an economic survey, sent to all members of the bar who have been practicing five years or less. The results of the survey are now in process of tabulation.

The Detroit Bar Association owns and maintains one of the most complete law libraries in the Middle West, and the association is proud of its excellent staff.

On June 24 President Charles A. Beardsley of the American Bar Association honored the Detroit association with a visit, and addressed a luncheon meeting on the subject "The Need for Legal Services Today and Tomorrow." An enthusiastic and overflow attendance enjoyed his most interesting and instructive address.

For the year 1940-41 the officers elected are Maurice H. MacMahon, President; Frank H. Boos, Vice-President and Secretary; and Glen M. Coulter, Vice-President and Treasurer.

MAURICE H. MACMAHON,
President.